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No.

In the Supreme Court of the United States

OCTOBER TERM, 1997

STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,
Petitioner,

v.

THE HONORABLE JOHN SPERONI,
TAMMY SNIDER AND MICHAEL AVERY
Respondents.

On Petition for a Writ of Certiorari to the Illinois Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition arises out of respondent trial judge's certification of a 48-state, five-million-person class action. Although only a small fraction of the class resides in Illinois, the trial court concluded that the case could be tried as a class action because the jury could apply the consumer fraud law of Illinois, petitioner's home state, to all class members' claims. Further, in an effort to make this massive class action manageable, the court relieved class counsel of the burden of proving the class members' highly fact-specific claims on an individualized basis. Finally, the court refused to require that class counsel provide actual notice to the 1.8 million members of the class who can be identified with specificity, ruling instead that publication notice is permissible for the entire class. The questions presented are:

1. Whether a court may constitutionally apply the law of the defendant's domicile to claims arising out of transactions that occurred entirely in other States, many of which have statutes or regulations specifically governing those transactions.

2. Whether it is consistent with due process requirements for a state court, in order to make class action treatment manageable, to relieve the class of its burden of proving the fact-specific claims of individual class members and to deprive the defendant of the opportunity to put on individualized proof to refute those claims.

3. Whether, in a class action seeking predominantly monetary relief, a state court's refusal to require that actual notice be provided to those members of the class whose names and addresses can be identified from petitioner's records violates the Due Process Clause of the Fourteenth Amendment.

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PETITION FOR A WRIT OF CERTIORARI

State Farm Mutual Automobile Insurance Company ("State Farm")[1] respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Illinois refusing to issue a writ of mandamus and/or prohibition or, in the alternative, a supervisory order in this case.

OPINIONS BELOW

The order of the Illinois Supreme Court denying State Farm's mandamus/prohibition/supervision petition (App., *infra,* 1a) is unreported. The trial court's orders certifying the class (*id.* at 2a-17a), amending the class certification (*id.* at 18a-20a), and approving class counsel's notice plan (*id.* at 21a-32a) are unreported.

JURISDICTION

The Illinois Supreme Court denied State Farm's mandamus/prohibition/supervision petition on March 24, 1998. App., *infra,* 1a. This Court's jurisdiction is invoked under 28 U.S.C. § 1257. Because in Illinois petitions for mandamus, prohibition, and supervisory orders are regarded as original actions (see Ill. S. Ct. R. 381, 383), the Illinois Supreme Court's denial of State Farm's petition is a final judgment for purposes of this Court's jurisdiction under Section 1257. *Fisher v. District Court,* 424 U.S. 382, 385 n.7 (1976); *Madruga v. Superior Court,* 346 U.S. 556, 557 n.1 (1954); *Pacific Coast Dairy v. Department of Agric.,* 318 U.S. 285 (1943); *Board of Educ. v. Superior Court,* 448 U.S. 1343, 1345-1346 (1980) (Rehnquist, J., in chambers); Robert L. Stern, et al., Supreme Court Practice 108 (7th ed. 1993).

STATEMENT

Multi-state class actions in state court have become the equivalent of legalized extortion. Class action lawyers identify one or two "representative" plaintiffs and carefully select a plaintiff-friendly forum — generally one with no connection to the claims of the vast majority of class members. They then file suit seeking certification of as large a class as possible, often obtaining an *ex parte* "conditional" certification before the defendant has even been

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[1] State Farm is a mutual insurance company. It has no parent company and no subsidiaries that are not wholly owned.

served. Having hand-picked a forum known to be hospitable to plaintiffs' lawyers, class counsel generally are able to achieve an "unconditional" class certification and then, using the threat of a single jury holding the financial fate of the defendant company in its hands, extort a settlement without the defendant ever having a realistic chance to refute the class's claims in court.

This familiar pattern is in the process of playing itself out in the small courtroom of an associate circuit court judge in Marion, Illinois (population 14,545), 146 miles from the State's capital and over 300 miles from its largest city. A consortium of plaintiffs' lawyers from around the country filed a 48-state class action there, alleging that State Farm's practice of sometimes specifying the use of parts manufactured by sources other than the original equipment manufacturer ("non-OEM parts") when adjusting claims for damage to insured vehicles constitutes a breach of State Farm's insurance agreements with its policyholders and a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act ("Illinois CFA"). This suit is proceeding in defiance of the insurance statutes and regulations of numerous States that either permit or require insurers to specify non-OEM parts and in the face of consumer groups' support of the use of non-OEM parts as a way of holding down the cost of insurance. True to form, within hours of filing the lawsuit class counsel first obtained an *ex parte* "conditional" class certification, which, after a hearing, was formalized via an opinion that deviates only minimally from the proposed order supplied by class counsel to the trial court. The class is estimated to have five million members, and class counsel assert that their claims are worth in excess of $2 billion.

The five million class members have myriad makes and models of automobiles, and literally thousands of different non-OEM parts were specified in the five million repair estimates. Nevertheless, in obtaining certification of this behemoth of a class, counsel persuaded the trial court that the millions of fact-specific breach of contract and consumer fraud claims could be litigated without requiring class members to demonstrate the inadequacy of the particular non-OEM parts specified in their repair estimates and without affording State Farm the opportunity to put on a defense as to the individual class members' various claims. They also persuaded the court that the Illinois CFA could be applied to the

claims of every class member, wherever that class member resides, because State Farm is headquartered in Illinois (although, it bears mention, nowhere near Marion). And finally, in order to spare themselves the expense and, at the same time, maximize the size of the class and hence its potential as a tool of extortion, they prevailed upon the trial court to require only a publication notice to the class even though it is possible to identify with certainty and provide actual written notice to approximately 1.8 million class members.

Having fended off State Farm's mandamus petition in the Illinois Supreme Court, class counsel have positioned themselves to subject State Farm to the classic class action dilemma — either pay the protection money they demand in the form of a settlement or risk a ten-digit judgment and injunction that would force State Farm to abandon a policy that has been endorsed by consumer groups and approved or required by legislatures and insurance commissioners throughout the country.

The dilemma in which State Farm has been placed is the product of multiple constitutional violations. This Court's precedents make it clear that state courts may not apply forum law to regulate transactions that have no connection to the forum, thereby impeding the flow of commerce elsewhere in the Nation; that defendants may not be deprived of the right to defend claims brought against them (even if doing so would facilitate the management of the case); and that, in a class action seeking predominantly monetary relief, actual notice must be given to all class members who are readily identifiable, even if doing so would be expensive for class counsel. Regrettably, disregard of these strictures has become commonplace in state court class actions, in which the financial interests of the class action lawyers have increasingly received the highest priority.

Because this case is representative of several recurring abuses in class action litigation, it provides a useful and appropriate vehicle for addressing a serious and growing constitutional problem that, as a consequence of the immense pressure to settle certified class actions, has consistently evaded post-judgment review.

1. *State Farm's non-OEM parts program.* For many years, State Farm has sought to contain insurance costs in a variety of

ways, including by encouraging competition in the automobile repair parts industry. State Farm has attempted to further this competitive objective within the express limits of the laws of the 50 States by providing in most of its policies that it may specify non-OEM repair parts when doing so would restore vehicles to their "pre-loss condition." R. Ex. 20 (Truttmann Aff.) ¶¶ 6, 9.[2] In the vast majority of States, State Farm's policy language expressly authorizing the specification of non-OEM parts has been reviewed and approved by the State's insurance commissioner to ensure conformity with the law of that State; several other States prescribe the policy language themselves. *Id.* ¶ 3.

Many of the categories of "crash parts" (fenders, hoods, bumper covers, and the like) that are at issue in this proceeding have been tested and inspected by the Certified Automotive Parts Association ("CAPA"), an independent organization that certifies the quality of crash parts used for auto body repairs. With respect to the many categories of parts that are subject to CAPA certification, State Farm will specify only those non-OEM parts that CAPA has certified. App., *infra,* 9a; R. Ex. 21 (Gibson Aff.) ¶¶ 15-17; Tr. 84-85, 409. In addition, State Farm guarantees in writing free replacement or repair of any non-OEM parts specified by State Farm that do not satisfy the policyholder. R. Ex. 21 ¶¶ 19-21; Tr. 82. It also offers policyholders the option of paying the difference in price in order to receive an OEM part. R. Ex. 21 ¶ 6.

Major consumer organizations, including the Consumers Union, the Consumers Federation of America, and the Center for Auto Safety, support State Farm's practice of specifying non-OEM parts because it significantly promotes policyholder interests. Tr. 213-214, 219-220. One consumer advocate and self-described "outspoken critic" of the insurance industry testified at the class certification hearing that "the insurance companies, and in this case, State Farm, are on the side of the angels." Tr. 213. The reason is simple. So long as insurers specify only OEM parts, the original manufacturers enjoy an absolute monopoly; they can, and will, charge monopoly prices for the parts. When, by contrast,

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[2] "R. Ex. __" refers to the record excerpts from the second mandamus proceeding in the Illinois Supreme Court; "Tr. ___" refers to the transcript of the class certification hearing.

non-OEM parts can be used, the original manufacturers lose their monopolies and must either price their parts competitively or risk a substantial diminution in their parts sales. Tr. 210-211, 216-220.

Precisely because non-OEM parts play a significant role in reducing the cost of auto repairs, many States, including Illinois, expressly authorize insurers to specify the use of non-OEM parts. Massachusetts actually *mandates* the specification of non-OEM parts in many circumstances. And Hawaii encourages the use of such parts by requiring insureds to pay the price differential if they insist on receiving OEM parts. See note 7, *infra*.

2. *The filing of this class action.* This action was filed in July 1997 in Marion, Illinois, on behalf of a purported class consisting of State Farm policyholders in 48 States.[3] Notwithstanding the express language in State Farm's policies authorizing the use of non-OEM parts, the complaint alleged that each of the tens of thousands of distinct non-OEM crash parts available for vehicle repairs is defective and inferior to its OEM counterpart and that every time State Farm specified the use of non-OEM parts it necessarily breached its obligation to restore the insured's vehicle to its pre-loss condition. The complaint was subsequently amended to add the allegation that State Farm's specification of non-OEM parts violates the Illinois CFA and to seek an injunction against any future specification of non-OEM parts.

The class's claims depend entirely on the allegation that *all* non-OEM parts are categorically inferior to the corresponding OEM parts. But testimony by an automotive engineering and design expert at the class certification hearing established that there is no basis for such a generalization and that an individualized inquiry is necessary to evaluate each part and hence each insured's claim. In particular, the expert testified without contradiction that there are over 33,000 separate and unique non-OEM crash parts produced by scores of manufacturers from all over the world; test results on one type of part (such as a fender) cannot be generalized to another

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[3] Class counsel excluded Arkansas and Tennessee from the class definition because one of them has filed statewide class actions in those States raising identical claims. The federal court in Tennessee has denied certification (see page 18, *infra*), and the Arkansas court has not yet ruled.

type of part (such as a hood); testing by OEM manufacturers themselves shows that the vast majority of non-OEM parts perform comparably to or better than OEM parts; both non-OEM and OEM parts vary significantly in quality and performance, so that only individualized testing and analysis can determine the quality and performance of any particular part; and whether a vehicle is restored to its "pre-loss condition" depends on many factors, including the condition of the vehicle before the loss, the quality of the make and model, the mileage and age of the vehicle, the nature of the damage sustained, and the competence of the repair shop. Tr. 221-222, 246-247, 250-251, 255, 455-461, 516-517, 560-561, 580-581, 590-597, 606, 613-618. In refusing to certify even a single-state class action, a federal court in Tennessee has made the same point. See page 18 & note 10, *infra*.

3. *Proceedings below.* State Farm opposed class certification, arguing that the proposed class did not satisfy the requirements of the Illinois class action statute, which is modeled on Fed. R. Civ. P. 23,[4] and that application of Illinois law to the claims of a nationwide class would violate State Farm's right to due process and unconstitutionally project Illinois law into other States. On December 5, 1997, in an opinion lifted almost verbatim from class counsel's proposed order, the circuit court rejected these arguments and certified a class of upwards of 25 million people, consisting of all State Farm policyholders in 48 States who had *any* kind of non-OEM part designated in a repair estimate. App., *infra,* 16a-17a.[5]

The court found that a 25-million-member class action could be manageably litigated because the class members' claims could be proven "on a class-wide basis," with the need for individualized proof limited to the issue of damages. *Id.* at 15a. It ignored State Farm's contention that each class member had to prove that the particular non-OEM parts specified in his or her repair estimate were incapable of restoring the class member's vehicle to its pre-loss condition and that State Farm had the right to introduce

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[4] 3 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 13.04, at 13-19 & App. 13-1, at 13-144 (1992).

[5] The class definition purported to carve out certain members of pre-existing California and Illinois settlement classes. App., *infra,* 17a.

evidence specific to each class member to prove the adequacy of the particular parts for the particular repair. The court also ruled that the Illinois CFA constitutionally may be applied to the claims of every class member, no matter where the particular insurance transaction or repair took place, simply because State Farm is headquartered in Illinois. *Id.* at 10a-11a.

On December 23, State Farm petitioned the Illinois Supreme Court for a writ of mandamus and/or prohibition or, in the alternative, for a supervisory order, contending, *inter alia*, that the certification order violated State Farm's due process rights and infringed the sovereignty of Illinois' sister States. That court issued an order on January 21, 1998, stating that there were insufficient votes either to grant or to deny the petition.

Meanwhile, class counsel retreated from their claim that *all* non-OEM parts were defective, now limiting their allegations to non-OEM *crash* parts. The circuit court adopted their redefinition and amended the class certification order on February 11, 1998. *Id.* at 18a-20a. The revised class includes about 5,000,000 policyholders (assuming the uniform application of Illinois' ten-year statute of limitations for contract claims regardless of where each class member's claim arose). *Id.* at 26a.

The battleground then shifted to the issue of class notice. Because State Farm could identify approximately 1,800,000 class members from its computerized repair records, it argued that class counsel should be required, at a minimum, to provide individual, mailed notice to those 1.8 million people.[6] Unwilling to bear the

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[6] The list of 1.8 million policyholders would have been compiled from State Farm's electronic estimating system, which includes the information necessary to distinguish repairs involving non-OEM crash parts from those not involving such parts. Because the electronic estimating system generally is not used for small claims involving only a few replacement parts, the remaining members of the class cannot be identified using this system. However, State Farm does have records of every repair since 1987 and stands ready to compile an overinclusive list of all insureds who received handwritten estimates specifying the use of crash parts (whether OEM or non-OEM). See App., *infra*, 26a. Thus, by use of this overinclusive list, actual notice could have been provided to every member of the class at his or her last-known address.

costs and administrative responsibility for the enormous class that they claim to represent, class counsel instead proposed publication of a brief notice in a variety of newspapers and magazines. State Farm objected to this notice plan on the ground, among others, that it violated the fundamental right of identifiable class members to individual notice and therefore exposed State Farm to further litigation even were it to prevail on the merits in this case.

On February 25, 1998, the circuit court adopted class counsel's notice plan. In an opinion that was drawn virtually verbatim from class counsel's proposed order, the court rejected State Farm's argument that due process requires individual notice to identifiable class members, concluding — amazingly — that class members are more likely to read legal notices in newspapers and magazines than they are to read a notice printed on official court letterhead and delivered by mail to their homes in embossed court envelopes. App., *infra,* 24a-25a, 27a-28a.

After being denied the right to file an interlocutory appeal, State Farm again sought a writ of mandamus and/or prohibition or, in the alternative, a supervisory order from the Illinois Supreme Court, this time challenging both the class certification order as amended and the circuit court's notice order. That petition was denied without comment on March 24, 1998. *Id.* at 1a.

REASONS FOR GRANTING THE PETITION

This Court has expressed concern about the "vexatiousness" of securities class actions and the possibility that they can be used to extort settlements that are "out of any proportion to [the class's] prospect of success at trial." *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 739-743 (1975). Today, this problem extends far beyond securities fraud cases, besieging large interstate companies with respect to many different areas of business activity. Put bluntly, the nationwide class action in state court has become the weapon of choice for those who seek to use the judicial system as a means of extorting multi-million dollar settlements from deep pocket defendants.

The present case illustrates many of the abuses for which class action practice has become infamous. In a procrustean effort to make this case fit into the class action mode, the trial court has

violated the sovereignty of Illinois' sister States, impeded interstate commerce, and abridged the due process rights of State Farm and the absent class members by insisting on applying Illinois law to the claims of non-Illinois class members whose insurance policies were issued in, and either approved or specifically prescribed by, other States. The court also violated State Farm's right to procedural due process by certifying a five-million-person class action that can be manageably tried only by relieving the class members of their burden of proving that the particular non-OEM parts specified in their repair estimates failed to restore their vehicles to pre-loss condition and by depriving State Farm of the opportunity to defend itself by demonstrating the contrary. And the court has violated the due process rights of both the absent class members and State Farm by allowing class counsel to avoid the expense of providing class members with the actual written notice required by this Court's precedents.

To be sure, this Court does not ordinarily agree to review lower court rulings when further proceedings below are anticipated. But class action litigation differs radically from ordinary cases. See *Blue Chip Stamps*, 421 U.S. at 740 (noting that the concern about vexatious litigation in securities class actions "is founded in something more substantial than the common complaint of the many defendants who would prefer avoiding lawsuits entirely to either settling them or trying them"). Because the stakes are so high, there is huge pressure to settle rather than roll the dice with a jury. Accordingly, the failure to review an erroneous certification before trial generally precludes any review. See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). As for the trial court's ruling authorizing notice by publication only, immediate review is necessary because waiting until after trial would give the class the very kind of unfair "one-way intervention" that the notice requirement is designed to prevent. See *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547 (1974).

The decision below reflects a widespread lack of clarity (to put it charitably) concerning the constitutional requirements for — and limits on — certification and management of nationwide classes by state courts. This Petition presents the Court with an ideal opportunity to provide needed guidance regarding those important requirements and limitations.

I. THE CIRCUIT COURT'S CLASS CERTIFICATION AND NOTICE ORDERS CANNOT BE SQUARED WITH THIS COURT'S PRECEDENTS

A. Application Of The Law Of State Farm's Domicile To The Claims Of All Class Members Unconstitutionally Projects Illinois' Regulatory Powers Beyond Its Borders.

1. In a wide range of contexts and under various constitutional provisions (including the Due Process, Full Faith and Credit, and Commerce Clauses), this Court consistently has rejected state efforts to apply local law to transactions that occurred entirely in other States. See, *e.g.*, *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568-573 (1996) (Alabama jury could not apply Alabama law to punish defendant for transactions taking place in other States); *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders"); *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 582-583 (1986) (rejecting New York's attempt to "project its legislation" into other States); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818-823 (1985) (Kansas court could not apply forum law to claims of class members that had no connection with Kansas); *Edgar v. MITE Corp.*, 457 U.S. 624, 641-643 (1982) (plurality op.) (Illinois anti-takeover statute impermissibly regulated transactions occurring entirely outside of Illinois); *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975) ("[a] State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State"); *New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914) ("[I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State * * * without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends."); *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881) ("[n]o State can legislate except with reference to its own jurisdiction").

Two of these cases — *Shutts* and *BMW* — are especially salient here. *Shutts* was a class action filed in Kansas on behalf of residents of all 50 States against a lessee of oil and gas properties located in 11 States. In an effort to facilitate adjudication of the case as a nationwide class action, the trial court applied Kansas law to every plaintiff's claim without regard to that plaintiff's State of residence or the location of the property that was the subject of the claim. Noting that "[t]here is no indication that when the leases involving land and royalty owners outside of Kansas were executed, the parties had any idea that Kansas law would control," the Court held that the application of Kansas law to claims that had nothing to do with Kansas was "sufficiently arbitrary and unfair as to exceed constitutional limits" imposed by the Due Process and Full Faith and Credit Clauses. 472 U.S. at 822. The Court emphasized that "Kansas 'may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them.'" *Ibid.* (quoting *Home Ins. Co. v. Dick,* 281 U.S. 397, 410 (1930)). It concluded that these "constitutional limitations * * * must be respected even in a nationwide class action." *Id.* at 823.

In *BMW,* this Court held that an Alabama jury could not punish the defendant under that State's general fraud law for vehicle transactions that had no connection to Alabama. As in the present case, many of the other States had statutes authorizing the very conduct that the Alabama jury had deemed wrongful. This Court found Alabama's effort to dictate standards of conduct in other States irreconcilable with principles of federalism, explaining: "[A] State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States. * * * [B]y attempting to alter BMW's nationwide policy, Alabama would be infringing on the policy choices of other States." 517 U.S. at 572 (footnotes omitted).

The trial court's attempt to make a nationwide class action manageable by applying the Illinois CFA to the claims of all of the five million class members is in irreconcilable conflict with *Shutts, BMW,* and the rest of the Court's long line of precedents in this area. As envisioned by the McCarran-Ferguson Act, 15 U.S.C. § 1011, the business of insurance is regulated "by the several States," with different States adopting varying approaches and policies. Of particular relevance here, many States have statutes or regulations

that specifically authorize, encourage, or even require the specification of non-OEM parts, and, consistent with these statutes and regulations, have reviewed and approved State Farm's policy language permitting it to specify the use of such parts.[7] The circuit

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[7] Massachusetts mandates that non-OEM parts "shall be used" except in specific limited circumstances (Mass. Regs. Code tit. 211, § 133.04), and Hawaii strongly encourages the use of non-OEM parts by requiring insureds to pay the price differential if they insist on receiving OEM parts (Haw. Rev. Stat. Ann. § 431:10C-313.6(a)). Many other States permit the use of non-OEM parts if disclosed to the insured. See Ariz. Rev. Stat. § 20-461; Cal. Code Regs. tit. 10, § 2695.8(f); Colo. Rev. Stat. § 10-3-1305; Conn. Gen. Stat. Ann. § 38a-355; Ga. Code Ann. § 33-6-5(13); Idaho Code § 41-1328D; 215 Ill. Comp. Stat. 5/155.29, Ill. Admin. Code tit. 50, § 919.80(d)(5); Kan. Stat. Ann. § 50-661; La. Rev. Stat. Ann. § 51.242; Mich. Comp. Laws § 257.1363; Miss. Code Ann. § 63-27.5; Mo. Code Regs. Ann. tit. 20, § 100-1.050(2)(D); 210 Neb. Admin. R. & Regs. § 45-006; Nev. Admin. Code ch. 686A, § 240; N.H. Stat. ch. 407-D; N.J. Admin. Code tit. 11, § 2-17.10(a)(11)-(13); N.Y. Comp. Codes R. & Regs. tit. 9, § 216.7(b)(5); N.C. Reg. 4.0426-4.0427; Ohio Rev. Code Ann. § 1345.81(B); Okla. Stat. tit. 15, § 955; S.D. Codified Laws § 58-33-71; Tenn. Comp. R. & Regs. tit. 0780, ch. 1-59-.04; Utah Code Ann. § 31A-22-319; Va. Code Ann. § 38.2-510(C); Wis. Stat. Ann. § 632.38. Some States permit the use of non-OEM parts even without disclosure. See 806 Fla. Admin. Code Ann. r. 4-166.027(10); Ky. Admin. Regs. 12:095 § 7(d)(9); Md. Code Ann. [Insurance] § 27-906. Some States permit the use of non-OEM parts if the insured consents. See R.I. Gen. Law § 27-10.2-2; Wyo. Ins. Dept. Reg. XIX §§ 2, 6. Other States require consent only during a limited time period. See Ark. Code Ann. § 4-90-306 (while vehicle is under original warranty); Ind. Code Ann. § 27-4-1.5-8(b) (five years); W. Va. Code § 46A-6B-3 (during year of manufacture and succeeding two years). One State requires consent only if non-OEM parts have not been certified by an independent test facility. Or. Rev. Stat. § 746.287.

Moreover, unlike in Illinois, the consumer fraud laws of many States do not encompass claims arising out of insurance contracts, which are instead left to the regulatory purview of the insurance commissioner. See, *e.g.*, *West v. Fireman's Fund Ins. Co.*, 683 F. Supp. 156, 156-157 (M.D. La. 1988); *O.K. Lumber Co. v. Providence Washington Ins. Co.*, 759 P.2d 523, 528 (Alaska 1988); *Ferguson v. United Ins. Co. of Am.*, 293 S.E.2d 736, 737 (Ga. Ct. App. 1982); *Wilder v. Aetna Life & Cas. Ins. Co.*, 433 A.2d 309, 310 (Vt. 1981). More generally, the consumer fraud

court's choice-of-law decision overrides the policies of those States and arrogates to itself the power to effectuate a nationwide condemnation of the use of such parts. If that court were to find that the use of non-OEM parts does violate the Illinois CFA, and if its choice-of-law ruling were allowed to stand, State Farm (and all other insurers domiciled in Illinois) would be compelled to discontinue the specification of non-OEM parts nationwide whether or not legislatures and insurance regulators in other States deem the use of such parts desirable. Nothing could be more intrusive to the sovereignty of Illinois' sister States, more corrosive of the federal system, or more squarely in conflict with *BMW*.

The trial court's decision to give nationwide extraterritorial effect to the Illinois CFA also directly conflicts with *Shutts*. Just as Kansas had no stake in whether Phillips should pay interest on delayed royalty payments to non-Kansans whose property was located outside of Kansas, Illinois has no legitimate interest in whether State Farm specifies the use of non-OEM parts for repairs made to vehicles owned by residents of other States pursuant to policy language that was reviewed and approved by the insurance regulators in those States. For Illinois to apply its law under such circumstances squarely violates the Full Faith and Credit Clause.

Furthermore, just as neither Phillips nor the non-Kansan class members could have anticipated that Kansas law would apply to

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laws of the various States differ significantly. See, *e.g.*, *In re Stucco Litig.*, 175 F.R.D. 210, 217 (E.D.N.C. 1997) (reviewing differences among States' consumer fraud statutes and denying certification of nationwide class in part because these differences, as well as differences in other applicable laws, would render class action unmanageable); *Tylka* v. *Gerber Prods. Co.*, 1998 WL 93277, at *4 (N.D. Ill. Mar. 3, 1998) (refusing to certify putative nationwide class action alleging violation of consumer fraud laws of the 50 States because "a brief review of the applicable statutes reveals not only [different] nuances, but differing standards of proof, procedure, substance, and remedies"). The stark contrast between the decision in *Tylka* by an Illinois federal court and that of the Illinois state courts in this case illustrates the widening gulf between federal and state courts regarding the appropriate limits on certification of multistate classes. The constitutional standards governing this question are (or should be) the same in state and federal court, and any distinction can only encourage further forum shopping by class action lawyers.

their disputes, neither State Farm nor out-of-state class members reasonably could have expected that Illinois consumer fraud law would govern any disputes between them. After all, the claim of a typical member of this putative class would involve a repair in, for example, Hawaii to a Hawaii resident's car pursuant to an insurance policy that was approved by Hawaii's insurance commissioner. Application of Illinois law to such a claim would constitute adjudication by ambush. There can be no serious doubt that, if an individual claim of this sort were brought in Hawaii (or even in Illinois), the court would apply Hawaii law.[8] In these circumstances, it can only be deemed "arbitrary and unfair" and a gross violation of due process for an Illinois court to apply Illinois law to the claims of non-resident class members merely because it would facilitate litigation of the case as a class action.

Finally, a verdict against State Farm under Illinois law would require it to violate the mandates of other States, such as Massachusetts and Hawaii. The untenable situation that this would create constitutes a wholly unacceptable burden upon the conduct of interstate commerce. See, *e.g.*, *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529-530 (1959).

2. The circuit court held that it could constitutionally apply Illinois' consumer fraud statute to the claims of all five million class members simply because "State Farm is situated and headquartered in Illinois and affirmatively uses Illinois courts and law." App., *infra*, 11a. This ruling implicates a split between the federal and state courts on this issue.

As far as our research has disclosed, every federal court to consider the question has held that it is impermissible to apply a

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[8] See *Okada v. MGIC Indem. Corp.*, 823 F.2d 276, 280 (9th Cir. 1986) ("Hawaii courts apply Hawaii state law when the acts covered by the policy occur in Hawaii, the insureds are Hawaii citizens, and the insurance company is not a Hawaii citizen."); see also *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 829 F.2d 227, 248 (1st Cir. 1987) (applying Ohio law where policy was issued in Ohio by Illinois-based insurer to Ohio-based company to cover risks arising in Ohio); *Northwestern Mut. Life Ins. Co. v. Wender*, 940 F. Supp. 62, 66-67 (S.D.N.Y. 1996) (New York law applies when policy is issued in New York notwithstanding fact that insurer is incorporated in Wisconsin).

single State's law in a nationwide class action simply because the defendant is headquartered in that State. See *Poe v. Sears, Roebuck & Co.*, 1998 WL 113561, at *4 (N.D. Ga. Feb. 13, 1998) (under *Shutts*, applying the law of the State in which the defendant is headquartered "would not pass constitutional muster"); *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332, 348 (D.N.J. 1997) (as a matter of both choice-of-law principles and due process, the fact that the defendant is headquartered in Michigan does not justify applying only Michigan law in 50-state class action); *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 177 F.R.D. 360, 371 (E.D. La. 1997) (under *Shutts*, Michigan law may not be applied in nationwide class action even though the defendant is headquartered in Michigan); *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 423 (E.D. La. 1997) (under applicable choice-of-law principles, the fact that defendant's primary place of business is in Illinois does not justify applying Illinois law to the claims of all members of a 50-state class); *Endo* v. *Albertine*, 1995 WL 170030, at *5 (N.D. Ill. Apr. 7, 1995) (fact that Illinois is defendant's primary place of business is not adequate under *Shutts* to justify applying Illinois law to claims of out-of-state class members).

The state courts, however, are divided on this issue. At least one other state court has agreed with the trial court's approach in this case and deemed the presence of the defendant's headquarters in the forum State sufficient for application of forum law in a nationwide class action. See *Clothesrigger, Inc.* v. *GTE Corp.*, 236 Cal. Rptr. 605, 608-609 (App. 1987). On the other hand, one state court has taken the same position as the federal courts. See *Duvall* v. *TRW, Inc.*, 578 N.E.2d 556, 559 (Ohio App. 1991) ("the fact that TRW is incorporated and headquartered in Ohio" is "an insufficient basis for applying Ohio law to these potential out-of-state class members").

In any event, the trial court's ruling cannot be squared with either the state sovereignty concerns underlying the Full Faith and Credit and Commerce Clauses or the fairness concerns underlying the Due Process Clause. As to the former, because the regulation of insurance is committed to the *several* States (the vast majority of which have enacted laws governing the specific practice at issue), the fact that State Farm is domiciled in Illinois is not a constitution-

ally sufficient basis for giving nationwide reach to Illinois' policy preferences (or, to be more accurate, those of one Illinois judge). Under the Full Faith and Credit Clause, Illinois may not apply its law to claims or cases in which it has no legitimate interest, and Illinois cannot claim such an interest with respect to insurance transactions conducted outside Illinois under the regulatory authority of other States simply because the defendant happens to be domiciled in Illinois. See *Shutts*, 472 U.S. at 821-822. Under the Commerce Clause, Illinois is forbidden to dictate to other States how business should be conducted there and cannot impose restraints, even on its own citizens, that would needlessly restrict commerce in those other States. See *MITE Corp.*, 457 U.S. at 640-646 (holding that Illinois' anti-takeover statute, which interfered with the offeror's tender for shares held by non-Illinois residents, violated Commerce Clause even though it was being applied to a tender offer for an Illinois corporation).

Nor could nationwide application of Illinois law be said to be within "the expectation of the parties," which this Court has indicated is "an important element" of the due process analysis (*Shutts*, 422 U.S. at 822). As explained above, any dispute between State Farm and an out-of-state policyholder regarding a claim adjusted in that policyholder's State of residence has *invariably* been governed by the law of that State; that State Farm is domiciled in Illinois would give neither State Farm nor anyone else involved reason to believe that the suit would be resolved under Illinois law, just as no one would expect a court to apply Massachusetts' statute requiring the specification of non-OEM parts when a Massachusetts-based insurer adjusts the claim of an Illinois policyholder in Illinois.[9]

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[9] It merits noting that nationwide application of the law of the State in which the defendant is domiciled would rarely be advantageous to all class members and often would be prejudicial to the majority of them. For example, many manufacturing entities are located in Michigan, a State that permits punitive damages only to the extent that compensatory damages are not sufficient to make the plaintiff whole (see, *e.g.*, *Thompson v. Paasche*, 950 F.2d 306, 314 (6th Cir. 1991)). It would hardly be beneficial for customers from jurisdictions with more liberal punitive damages regimes to be clumped into a nationwide class whose claims against a Michigan manufacturer are to be tried exclusively under

The Court should grant certiorari to clarify that courts may not constitutionally apply the law of the defendant's domicile to claims arising out of transactions that occurred entirely in other States.

B. Trial Of The Case On The Basis Of Class-Wide Evidence, Without Individualized Proof Establishing The Inadequacy Of The Particular Non-OEM Parts Specified In Particular Class Members' Repair Estimates, Violates Due Process.

It is undisputed that there are tens of thousands of different non-OEM crash parts manufactured by scores of different companies around the world. Determining whether any particular non-OEM part is incapable of restoring a vehicle to its pre-loss condition requires analysis of the specific part (as well as consideration of the vehicle's condition and the skill of the repair shop). Thus, for example, even if class counsel could prove that a replacement hood manufactured by X Co. in Thailand for the 1993 Honda Accord sedan is inadequate because it does not close properly, that would in no way establish (i) that X Co.'s replacement hood for a 1989 Cadillac Deville coupe fails to close properly and hence is inadequate, (ii) that a non-OEM replacement hood manufactured by Y Co. in Japan for the 1993 Honda Accord sedan is inadequate in any way, (iii) that X Co.'s replacement fenders for the 1993 Accord, 1989 Cadillac, or any other vehicle are inadequate in any way, or (iv) that Y Co.'s replacement fenders for Accords, Cadillacs, or other vehicles are inadequate.

Were an individual policyholder to sue State Farm for breach of contract or consumer fraud arising out of the specification of a supposedly inferior non-OEM part, that policyholder undeniably would have the burden of establishing that the particular non-OEM part specified in his or her repair estimate failed to restore his or her vehicle to its pre-loss condition. State Farm would then be entitled to put into evidence exemplars of the non-OEM part specified in the repair estimate and its OEM counterpart, introduce results of tests performed on those parts, and adduce testimony of metallurgists, automotive engineers, and appraisers to compare the durability of the parts at issue and the effect of their use on resale

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Michigan law.

value. In addition, State Farm would be entitled to introduce evidence of the vehicle's pre-loss condition (which might well have been less than pristine), the competence of the repair shop, and any other evidence tending to show that the vehicle was in fact restored to its pre-loss condition or that any failure to meet that standard was not attributable to the use of a non-OEM part.

These rights may not be cast aside simply because it would otherwise be impossible to conduct a manageable class action. Indeed, it is for this very reason that other courts faced with precisely the same attack on the specification of non-OEM parts have refused to certify even *statewide* classes. See *Murray v. State Farm Mut. Auto. Ins. Co.*, No. 96-2585-M1/A (W.D. Tenn. Aug. 19, 1997); *Rios v. Allstate Ins. Co.*, No. 94 CH 11396 (Cook Cty. Cir. Ct. Jan. 27, 1998); see also *Moorhead v. State Farm Mut. Auto. Ins. Co.*, No. 95-AR-0668-S, Order at 6 (N.D. Ala. Sept. 12, 1997) (refusing to certify class because of inadequacy of class representatives, but indicating doubt as to whether the class claims satisfied the commonality requirement).[10] The circuit court's contrary determination in this case that trial can be conducted

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[10] The *Murray* court explained:

> Although there may be questions of fact as to whether a particular non-OEM crash part is inferior to its OEM counterpart, those questions are certainly not common. In fact, as defendants explain, this determination, given the differences in vehicle makes and models and the fact that there are several manufacturers of non-OEM crash parts, would require the testing of thousands of individual crash parts. * * *
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> [I]t is clear that given the variety of vehicle makes, models, and years, the different types of crash parts, and the number of part manufacturers, it cannot be said that common issues predominate over the individual issues. * * *
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> [I]t is clear that the difficulties likely to be encountered in the management of a class action would be great and would, in essence, require hundreds or thousands of mini-trials in order to determine if plaintiffs were entitled to recover.

Order Denying Plaintiff's Motion for Class Certification at 15, 25, 26. A copy of this Order has been lodged with the Clerk of this Court and served on respondents.

without consideration of individualized proof and without affording State Farm the opportunity to defend the claims as it would in an individual case is in conflict with this Court's general due process precedents as well as with the consistent rulings of the federal courts in the class action context.

This Court repeatedly has stated that "'[d]ue process requires that there be an opportunity to present every available defense.'" *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quoting *American Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932)); see also *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971) (a defendant's "right to litigate the issues raised" is "a right guaranteed to him by the Due Process Clause"). That due process right may not be abridged through the class action device any more than it may be eviscerated through any other state procedure. As this Court recently recognized, under federal procedure, class actions are permitted to "'achieve economies of time, effort, and expense, and promote . . . uniformity of decisions as to persons similarly situated,'" but only when those goals can be achieved "'*without sacrificing procedural fairness* or bringing about other undesirable results.'" *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2246 (1997) (emphasis added); cf. *Shutts*, 472 U.S. at 821 ("the question of the constitutional limitations on choice of law * * * is not altered by the fact that it may be more difficult or more burdensome to comply with the constitutional limitations because of the large number of transactions which the State proposes to adjudicate and which have little connection with the forum"). It goes without saying that the due process requirement of "procedural fairness" adverted to in *Amchem* applies with full force in state-court class actions. See, *e.g.*, *Shutts*, 472 U.S. at 818-823 (applying due process limitations on choice of law in state court class action); *cf. Hansberry v. Lee*, 311 U.S. 32, 40 (1940).

By the expedient of class certification, the circuit court in this case has relieved the class members of the burden of making the showing that would be required in any individual case and has deprived State Farm of the right to make the kind of defense it would be entitled to make in an individual case. As several federal courts have recognized, such an approach runs roughshod over the defendant's due process right to defend itself. See *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990); *Western Elec. Co. v. Stern*,

544 F.2d 1196, 1199 (3d Cir. 1976); *Arch v. American Tobacco Co.*, 175 F.R.D. 469, 487-489 & n.21 (E.D. Pa. 1997); *Masonite*, 170 F.R.D. at 425; *Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 372 (D.N.J. 1987), mandamus granted on other issues, 855 F.2d 1062 (3d Cir. 1988). The Court should grant certiorari to confirm that a defendant's right to procedural due process may not be compromised through the class action device, however expedient that may appear to the trial court and class counsel.

C. The Trial Court's Order Excusing Class Counsel From The Obligation To Provide Actual Notice To Identifiable Members Of The Class Presents An Important Issue Worthy Of Immediate Review.

1. In a wide range of contexts, including class actions seeking monetary relief, this Court has "adhered unwaveringly" to the principle that, when the names and addresses of interested parties are readily identifiable, publication notice is a constitutionally inadequate means of informing them of the existence of a proceeding that will affect their rights: the Due Process Clause requires that such parties be afforded actual notice by means of either personal service or mailed notice. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 795-797 (1983). Accord, *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478 (1988); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-175 (1974); *Schroeder v. City of New York*, 371 U.S. 208, 211-213 (1962); *Walker v. City of Hutchinson*, 352 U.S. 112, 115-116 (1956); *City of New York v. New York, N. H. & H. R. Co.*, 344 U.S. 293, 296 (1953); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); cf. *Shutts*, 472 U.S. at 811-814 (due process does not require opt-in procedure when class members have received *actual notice* of the class action and the opportunity to opt out).[11]

In *Eisen*, the Court considered the notice requirement in the context of a federal class action, holding that "[i]ndividual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort." 417 U.S. at 173.

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[11] The notice requirements may be less stringent in non-opt-out class actions seeking predominantly non-monetary relief. Our arguments here are limited to class actions seeking predominantly monetary relief.

Although this conclusion was based on the language of Fed. R. Civ. P. 23(c)(2), which requires that class members be provided "the best notice practicable under the circumstances *including individual notice to all members who can be identified through reasonable effort,*" the Court emphasized that that provision was "'designed to fulfill the requirements of due process to which the class action procedure is of course subject.'" 417 U.S. at 173 (quoting Advisory Committee Note). In requiring individual notice, the Advisory Committee was guided by *Mullane*'s holding that "publication notice could not satisfy due process where the names and addresses of the [affected individuals] were known." *Id.* at 173-174. Endorsing that view, the *Eisen* Court stated: "In such cases, 'the reasons disappear for resort to means less likely than the mails to apprise them of an action's pendency.'" *Id.* at 174-175 (quoting *Mullane,* 339 U.S. at 318) (alterations deleted). As further support, the *Eisen* Court invoked *Schroeder* — another due process case — which, it noted, "explained that *Mullane* required rejection of notice by publication where the name and address of the affected person were available." *Id.* at 175.

By relying on *Mullane, Schroeder,* and the Advisory Committee Note, *Eisen* makes clear that individual notice is a requirement of due process, not just Rule 23. Any doubt on that score was removed in *Shutts,* which was a state-court class action. The defendant argued that the state court could not exercise personal jurisdiction over class members who had not affirmatively indicated an intention to be bound by the judgment by "opting in" to the class. This Court disagreed, holding that so long as class members received notice and an opportunity to "opt out," it was permissible for the forum to exercise jurisdiction over the absent class members. Citing *Mullane* and *Eisen,* the Court stated that "[t]he notice must be the best practicable, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." 472 U.S. at 812 (internal quotation marks omitted). Turning to the facts of the case, the Court found due process satisfied by "the procedure followed by Kansas, where a fully descriptive notice is sent first-class mail to each class member, with an explanation of the right to 'opt out.'" *Ibid.* In short, after *Shutts* it is (or at least

should be) clear that the minimum acceptable notice requirements are one and the same in state and federal court.

On the basis of these cases, State Farm argued below that class counsel had to attempt to provide actual notice at least to the 1.8 million class members whose names and addresses can be identified from State Farm's computerized database.[12] In addition, although the remaining class members could not be identified with specificity from State Farm's records, State Farm stood ready to supply a list of all State Farm insureds since 1987 whose estimates included one or more crash parts, whether OEM or non-OEM. See note 6, *supra*. Use of this list would have given actual notice to the maximum number of class members. But whether or not providing actual notice to everyone on this overinclusive list is constitutionally required (an issue that this Court has not definitively resolved), the trial court's refusal to require that actual notice be provided *to anyone* is utterly irreconcilable with *Mullane* and its progeny.

2. The trial court's reasons for refusing to require actual notice patently conflict with this Court's precedents and serve to underscore the need for immediate review. The trial court's principal rationale was its conclusion that mailed notice would be no more effective than publication notice. App., *infra*, 24a-25a, 27a-28a. In so stating, the trial court ignored not just State Farm's evidence but also this Court's repeated conclusion — which is even truer in today's era of reduced newspaper subscribership — that publication notice is "a poor substitute for actual notice." *Eisen*, 417 U.S. at 175; see also *Walker*, 352 U.S. at 116 ("It is common knowledge that mere newspaper publication rarely informs a landowner of

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[12] Because inadequate notice would provide grounds for class members to escape the binding effect of any judgment, State Farm unquestionably is entitled to challenge the adequacy of the notice provided to class members. See *Shutts*, 472 U.S. at 805 ("Whether it wins or loses on the merits, [defendant] has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata just as [defendant] is bound. The only way a class-action defendant * * * can assure itself of this binding effect of the judgment is to ascertain that the forum court has jurisdiction over every plaintiff whose claim it seeks to adjudicate, sufficient to support a defense of res judicata in a later suit for damages by class members.").

proceedings against his property."); *New York, N. H. & H. R. Co.*, 344 U.S. at 296 ("Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice."); *Mullane*, 339 U.S. at 315 ("It would be idle to pretend that publication alone * * * is a reliable means of acquainting interested parties of the fact that their rights are before the courts."); *id.* at 318 ("Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency."). If there were any reason to retreat from this Court's long-standing view that publication notice is an inadequate substitute for actual notice, it should be done by this Court, not a trial judge in Marion, Illinois, in a class action that purports to bind 5 million people.

The trial court also sought to justify its refusal to require actual notice on the ground that State Farm could identify "only" 1.8 million class members with specificity and that some percentage of those class members might have moved after discontinuing their policies with State Farm, making it less likely that mailed notice would actually reach them. App., *infra*, 25a-27a. While this is a good reason to require publication as a supplement to direct mailings, it is utterly mystifying why it should excuse a failure even to attempt actual notice, which undeniably would be effective to reach a substantial majority of the identifiable class members.[13]

Finally, the trial court's assertion (App., *infra*, 29a-30a) that *Eisen* is based exclusively on the language of Fed. R. Civ. P. 23 and hence has no application in a state court class action is, as demonstrated above, utterly untenable. To the extent there is any question on this score, however, it is one that warrants review and resolution by this Court.

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[13] Indeed, *Eisen* implicitly rejects both grounds. In that case, the Court required that individual notice be mailed to the 2.25 million class members who were "easily ascertainable" even though another 3.75 million class members could not be identified and even though it was virtually certain that the addresses for some significant number of the 2.25 million class members would not be current. 417 U.S. at 166, 175.

II. THE ISSUES PRESENTED RECUR IN STATE-COURT CLASS ACTION LITIGATION AND REQUIRE IMMEDIATE RESOLUTION

This Court's immediate review of the trial court's class certification and notice orders is necessary and appropriate because the constitutional infirmities in those orders are common in state court class actions and because the failure to review those orders now may preclude effective review later.

A. The Abuse Of The Class Action Device In The State Courts Is Reaching Epidemic Proportions.

The constitutional violations involved in this case are part of a disturbing pattern in contemporary class action litigation. The federal courts have repeatedly concluded that nationwide class actions raising state common law claims could not be certified consistent with the requirements of Fed. R. Civ. P. 23, due process, and federalism. See, *e.g.*, *Andrews v. American Tel. & Tel. Co.*, 95 F.3d 1014 (11th Cir. 1996); *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996), aff'd sub nom. *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231 (1997); *In re Am. Medical Sys., Inc.*, 75 F.3d 1069 (6th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995). The federal courts also have taken seriously this Court's holdings in *Eisen* and *Mullane*, insisting that those who purport to represent a class assume the responsibility and expense of providing actual written notice to class members whose names and addresses are identifiable. See, *e.g.*, *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1007-1008 (D.C. Cir. 1986); *Bremiller v. Cleveland Psychiatric Inst.*, 898 F. Supp. 572, 581 (N.D. Ohio 1995).

Seeking a more hospitable forum, class action lawyers have shifted their attention to state court. As one neutral researcher has reported, the "doubling or tripling over the past several years of the number of putative class actions" faced by American companies has been "concentrated in the state courts." Deborah Hensler et al., *Preliminary Results of the RAND Study of Class Action Litigation*

15 (1997).[14] See also Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. Rev. 547, 575 (1996) (certification of nationwide classes by state courts "has been increasing in recent years"). Indeed, the lead appellate lawyer for the putative class in this case candidly acknowledges that "[i]t is no secret that class actions — formerly the province of federal diversity jurisdiction — are being brought increasingly in the state courts." Elizabeth J. Cabraser, *Life After Amchem: The Class Struggle Continues*, 31 Loy. L.A. L. Rev. 373, 386 (1998).

Nor are class action attorneys using just any state court in their effort to circumvent the constitutional limitations on class actions; with increasing frequency they are filing their cases in state courts that have acquired a reputation for acquiescing in requests for nationwide certification and running roughshod over the constitutional rights of defendants and absent class members. For example, in 1995-1997 courts in six thinly populated rural Alabama counties certified 43 class actions, at least 28 of which were brought on behalf of nationwide classes, primarily against large national companies. Stateside Associates, *Class Action Lawsuits in State Courts: A Case Study in Alabama* (1998) (attached to Statement of Dr. John B. Hendricks before the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary (Mar. 5, 1998), available at 1998 WL 122544).[15]

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[14] Anecdotal evidence supports the conclusion that the absolute number of state-law class actions has been skyrocketing. For example, the Vice President-General Counsel of Ford Motor Company testified before Congress that the number of class action lawsuits pending against Ford has escalated from 8 in 1990 to 50 at the end of 1995 to over 100 by the end of 1997. Statement of John W. Martin, Jr. before the Courts and Intellectual Property Subcommittee of the House Committee on the Judiciary (Mar. 5, 1998), available at 1998 WL 122533.

[15] More anecdotally, the Wall Street Journal has reported:

> Plaintiffs' lawyers are going out of their way to sue big companies these days. All the way to backwaters like Plaquemine, La., Union City, Tenn., and Eutaw, Ala. A growing number of big lawsuits are landing in small towns. * * *
>
> The trend is an outgrowth of federal courts' growing aversion to

These hand-picked state courts have demonstrated a propensity to certify classes that federal courts have refused to certify and to casually dispense with the procedural safeguards required by the Constitution and faithfully applied in the federal courts. For example, in 1996 a judge in Mobile County, Alabama, certified a nationwide class action alleging state law products liability, breach of warranty, negligence, and fraud claims on behalf of several million owners of homes on which the defendants' siding had been installed. In an opinion written by class counsel, the court brushed aside the constitutional choice-of-law problem, stating, without the slightest legal analysis, that "the Court is not persuaded that the variations in applicable state laws are so significant as to create predominant individual issues." Order Certifying Plaintiff Class at 8, *Naef v. Masonite Corp.*, No. CV-94-4033 (Mobile Cty. Cir. Ct. Nov. 15, 1995) (reprinted in *Ex parte Masonite Corp.*, 681 So. 2d 1068, 1090 (Ala. 1996)). The court also gave short shrift to the contention that the claims were fact-specific and that the defendants were being denied the opportunity to prove defenses specific to the individual class members. *Ibid.* And, as in this case, the court refused to provide actual notice to the class, accepting class counsel's representation that publication notice was good enough. See 681 So. 2d at 1075 (declining to overturn trial court's acquiescence in class counsel's plan to provide notice only by publication). After the Alabama Supreme Court denied mandamus, the trial court held a "first-phase" trial limited to the issue of whether the defendants' products were defective. In that trial, the court purported to solve the dilemma of having to apply the laws of the

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> massive litigation: Over the past year, federal judges dismissed giant cases against tobacco companies and asbestos manufacturers, and imposed new limits making it more difficult to file class-action suits in federal court. * * * So plaintiffs' lawyers are taking their act on the road.
>
> Rural courts offer lawyers a strategic advantage. In major metropolitan areas, judges are assigned to cases by lottery, but small communities often have only one or two judges in town. * * * Unlike federal judges, many state judges are popularly elected, raising the possibility of bias.

Richard Schmitt, *Justice RFD: Big Suits Land in Rural Courts*, Wall St. J., Oct. 10, 1996, at B1.

51 jurisdictions by simply making up its own law, amalgamating bits and pieces of the laws of the 51 jurisdictions into five different design defect standards that did not accurately represent the law of *any* State.[16]

Meanwhile, another set of class action lawyers sought certification of an identical class in federal court. That court denied certification, holding that "[d]ifferences in state law and user facts overwhelm the common elements of plaintiffs' claims. Combined, these differences are so great as to make national class treatment unwieldy, unfair, and unlawful." *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 425 (E.D. La. 1997). The court further explained that the experience with the first phase of the Alabama case "supplies ample evidence of legal and factual variation, and thus counsels against manageability and superiority." *Id.* at 426 n.19. It deemed inadequate the Alabama court's attempt to boil down the laws of 51 jurisdictions into five sets of "Esperanto instruction[s]," opining that "[t]he number of state products liability laws that confront Masonite and their doctrinal dissonance cannot be glossed over casually." *Id.* at 422. The court concluded that "Due Process, the Seventh Amendment, * * * and Rule 23 make it impossible to accommodate the theoretical benefits of class treatment." *Id.* at 427.

Similarly, in 1996 a federal district court in Alabama refused to certify a class action alleging that a subsidiary of General Motors fraudulently failed to disclose that it purchases installment contracts at a lower interest rate than the one charged to the car purchaser by the dealer. *Mack v. General Motors Acceptance Corp.*, 169 F.R.D. 671 (M.D. Ala. 1996). Reasoning that the jury would have to examine the circumstances of each transaction to resolve such issues as duty to disclose and reliance, the court dubbed the case "the antithesis of a class action." *Id.* at 677-678. Yet an Alabama trial court certified a class action raising the identical claims against

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[16] For a fuller description of the constitutionally flawed procedures imposed in *Masonite*, see Application for a Stay of Proceedings Pending the Filing of a Petition for a Writ of Certiorari to Review a Final Decision of the Supreme Court of Alabama, *International Paper Co. v. Naef*, No. A-28 (filed July 3, 1997). During the pendency of the stay application, the parties settled the case and the defendants withdrew the application.

a Ford subsidiary, and the Alabama Supreme Court refused to intervene. See *Ex parte Ford Motor Credit Co.*, 697 So. 2d 464 (Ala. 1997) (Hooper, C.J., dissenting).

The present case is but the latest example of this regrettable phenomenon. As described above, several courts (both state and federal) have refused to certify even *statewide* classes raising the precise claims that have been certified for class action treatment in this case. See page 18, *supra*. The only distinction between this case and the other non-OEM cases is that class counsel appear to have been more careful in selecting their forum — a distinction that manifestly should make no difference.

B. The Coercive Effect Of Class Certifications And The Fairness Concerns Underlying The Notice Requirement Make Immediate Review Necessary And Appropriate.

1. It is critical that the Court act now to review the class certification order rather than wait until after a trial on the merits. That order hangs like a Damoclean sword over State Farm, threatening to force it into an unwarranted settlement and coerced relinquishment of its right to trial. As the Seventh Circuit has explained, companies that face a large certified class and hence enormous potential damages are "under intense pressure to settle." *Rhone-Poulenc*, 51 F.3d at 1298 (Posner, C.J.). If, not wanting to "roll these dice," they settle, "the class certification — the ruling that will have forced them to settle — will never be reviewed." *Ibid*. These are "blackmail settlements." Henry J. Friendly, Federal Jurisdiction: A General View 120 (1973); see also *Castano*, 84 F.3d at 746 (pressure emanating from certifications of big classes amounts to "judicial blackmail," creating "insurmountable pressure on defendants to settle"; "[t]he risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low").

The *Masonite* class action is illustrative. The defendants in that case twice sought mandamus from the Alabama Supreme Court to prevent the plaintiffs and the trial court from vitiating their due process rights by imposing a trial plan that precluded them from raising individualized defenses and proving that the siding supplied to particular class members was not in fact defective. When the Alabama Supreme Court denied their second request for relief,

defendants, finding themselves in the paradigmatic class action dilemma, chose to settle the case for between $150 million and $600 million rather than risk bankrupting liability at the hands of a Mobile County jury. See Matthew Ebnet, *Siding Case Aids Homeowners: Company Will Pay Repair Bills for Masonite Flaws*, Kansas City Star, Aug. 3, 1997, at A1.

The amount of damages claimed by class counsel in this case is similarly extraordinary and, as in *Masonite*, creates an enormous pressure to pay the protection money demanded by class counsel and to forgo not just the right to challenge the propriety of the class certification but also the right to defend on the merits. If State Farm were to succumb to this pressure, the effect would be to coerce abandonment of the use of non-OEM parts *nationwide* — not only by State Farm, but, because of the *in terrorem* effect of such an outcome, by all auto insurers — without any appellate court having ever addressed on the merits the propriety of the devices employed to grease the skids of this class action.

This Court has recognized the importance of interlocutory review of class certifications by submitting to Congress a proposed amendment to Fed. R. Civ. P. 23 that would give the federal courts of appeals discretion to hear appeals from the grant or denial of class certifications without applying either the requirements of 28 U.S.C. § 1292(b) or the exacting standards for a writ of mandamus. The Committee Note accompanying the proposed new rule specifically recognizes that a discretionary power of interlocutory review of class certifications is desirable because "[a]n order granting certification * * * may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." Similarly, the Report of the Judicial Conference's Committee on Rules of Practice and Procedure recommending approval of the new rule opines that "the proposed change to Rule 23(f) could have immediate and substantial beneficial impact on class action practice" because "[a] certification decision is often decisive as a practical matter": while the denial of certification can put an end to an action seeking to vindicate large numbers of small claims, "certification can exert enormous pressure to settle."

This wise change to the federal rules currently has no counterpart in most States, including Alabama, Illinois, and other magnets for class action litigation. Generally, defendants may obtain review of class certifications in state court only by attempting to meet the stringent standards for mandamus. As the experience of State Farm, Masonite, Ford Motor Credit, and others has shown, that is often an insurmountable hurdle. It is for that reason critical that this Court exercise its discretionary authority to grant certiorari on an interlocutory basis when, as in this case, the constitutional violations are manifest and recurring.

2. The need for immediate review of the trial court's order permitting publication-only notice is even more compelling. If State Farm were forced to litigate this case as a nationwide class action, it should, at the very least, not be subjected to the risk that any victory it achieves will be effectively vitiated because the notice was constitutionally insufficient to bind absent class members. As this Court has explained, Rule 23's requirement that class members receive the best practical notice (which has its genesis in due process (see page 21, *supra*)) and then make a binding determination about whether to remain in the class was a response to "[a] recurrent source of abuse under the former Rule" — namely, "the potential that members of the claimed class could in some situations await developments in the trial or even final judgment on the merits in order to determine whether participation would be favorable to their interests. * * * This situation — the potential for so-called 'one-way intervention' — aroused considerable criticism upon the ground that it was unfair to allow members of a class to benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one." *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547 (1974). The purpose of requiring notice and an opt-out decision before trial — which is rooted in fundamental fairness — would be utterly frustrated by allowing the notice issue in this case to await resolution until after a final judgment on the class claims.

CONCLUSION

The Court should grant the petition for a writ of certiorari and summarily reverse the judgment below or, in the alternative, order plenary briefing and argument.

Respectfully submitted.

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JUNE 1998

APPENDIX

APPENDIX A

SUPREME COURT OF ILLINOIS

March 24, 1998

No. 85008

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

HON. JOHN SPERONI, ASSOCIATE JUDGE OF THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, ET AL., ETC.,

Respondents.

THE COURT HAS TODAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

State Farm Mutual Automobile Insurance Company, petitioner, v. Hon. John Speroni, Associate Judge of the Circuit Court of the First Judicial Circuit, et al., etc., respondents.

Motion by petitioner for leave to file a petition for an original writ of mandamus and/or writ of prohibition or for a supervisory order. Motion *denied*. Bilandic, J., took no part.

APPENDIX B

IN THE CIRCUIT COURT FOR THE
FIRST JUDICIAL CIRCUIT
WILLIAMSON COUNTY, ILLINOIS

No. 97-L-114

TAMMY SNIDER AND MICHAEL AVERY,
ON BEHALF OF THEMSELVES AND
ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

vs.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant.

ORDER AND FINDINGS THAT ACTION MAY BE MAINTAINED AS A CLASS ACTION FOR BREACH OF CONTRACT, CONSUMER FRAUD AND EQUITABLE RELIEF CLAIMS

I. SUMMARY OF THE CASE

The representative plaintiffs ("Plaintiffs") in this class action allege that defendant State Farm Mutual Automobile Insurance Company ("State Farm") has breached its contract with its auto insurance policyholders, and violated the provisions of Illinois' Consumer Fraud and Deceptive Business Practices Act (the "CFA"), 815 ILCS 505/1 *et seq.* Plaintiffs seek certification of a class (the "Class") composed of:

> All persons in the United States, except those residing in Arkansas and Tennessee, who (1) were insured by a vehicle casualty insurance policy issued by Defendant State Farm and (2) made a claim for vehicle repairs pursuant to their policy and had imitation that is, non-factory-authorized and/or non-OEM parts installed on their vehicles or else received

monetary compensation determined in relation to the cost of imitation parts. Excluded from the class are employees of Defendant State Farm, its officers, its directors, its subsidiaries, or its affiliates.

In addition, the following persons are excluded from the class: (1) persons who resided in Illinois and whose policies were issued/executed prior to April 16, 1994, and (2) persons who resided in California and whose policies were issued/executed prior to September 26, 1996.

Plaintiffs' claims concern contractual language in standard form State Farm automobile insurance policies issued nationwide. This language either obligates State Farm to restore a policyholder's vehicle to "its pre-loss condition" after an accident, or for State Farm to "pay to repair or replace the property or part with like kind and quality." While State Farm has designed form policies specific to each state, the contractual obligations at issue in this case are stated in substantially identical form in State Farm policies issued nationwide.

Notwithstanding this language, State Farm's uniform policy specifies the use of certain non-original equipment manufacture (non-OEM) replacement parts (referred to as "quality replacement parts" by State Farm and "imitation parts" by Plaintiffs) when these parts are priced lower than original equipment manufacturer's (OEM) parts. Whether this policy violates the above-referenced provisions of State Farm's insurance contracts with its policyholders is the central issue of this litigation.[1]

In their Second Amended Class Action Complaint (A) (the "Complaint"), their submissions, and their arguments before the Court, Plaintiffs contend that non-OEM parts are neither of "like kind and quality," nor are they sufficient to restore a policyholder's vehicle to its "pre-loss condition." For this reason, Plaintiffs

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[1] Throughout the hearing there was much discussion as to what parts may or may not be "crash parts." Throughout this order the Court has used the term "non-OEM parts" without specifying "crash parts" so as to mirror the Class definition.

contend that State Farm has breached its contract with its policyholders. Plaintiffs seek damages for breach of contract and for State Farm's alleged violation of CFA. Plaintiffs also seek equitable relief against State Farm as set forth in Plaintiffs' Complaint.

State Farm contends that non-OEM parts (particularly those certified by the Certified Auto Parts Association ("CAPA")) are of "like kind and quality" to OEM parts, and that they fully restore a policyholder's vehicle to its "pre-loss condition." State Farm also contends that its policyholders are informed whenever non-OEM parts are used, and that its use of the term "quality replacement parts" is not misleading.

II. GOVERNING LEGAL STANDARD

Certification of a class action in the State of Illinois is governed by 735 ILCS 5/2-801, which provides as follows:

> An action may be maintained as a class action in any court of this State and a party may sue or be sued as a representative party of the class only if the court finds:
>
> (1) The class is so numerous that joinder of all members is impracticable.
>
> (2) There are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members.
>
> (3) The representative parties will fairly and adequately protect the interests of the class.
>
> (4) The class action is an appropriate method for the fair and efficient adjudication of the controversy.

Plaintiffs request class certification under 5/2-801. The Court has carefully considered the testimony adduced over the course of the evidentiary hearing on class certification completed in November, 1997, the affidavits filed by Plaintiffs and State Farm, the pleadings and briefs submitted to the Court, the voluminous exhibits introduced at the certification hearing, and the arguments by counsel. *See Gordon v. Boden*, 224 Ill. App. 3d 195, 199, 586

N.E.2d 461, 464 (1991). In considering class certification the Court has assigned to Plaintiffs the burden of satisfying the four requirements of 5/2-801. *Wheatley v. Board of Ed. of District 205*, 99 Ill. 2d 481, 486, 459 N.E.2d 1364, 1367 (1984). The Court has not considered the possibility of success on the underlying merits, but only whether the statutory requisites for class certification are satisfied at this time. *See Purcell & Wardrope Chartered v. Hertz Corp.*, 175 Ill. App. 3d 1069, 1075, 530 N.E. 2d 994, 998 (1988) ("hypothetical problems that may arise in the future***[are] not a sufficient basis to refuse to certify an otherwise properly pleaded class action.") Applying this standard, the Court makes the following findings of fact, and the following conclusions, with respect to each of the four statutory requirements for certification of a class action in Illinois.

III. CERTIFICATION ISSUES

A. Numerosity and Impracticality of Joinder

735 ILCS 5/2-801(1) requires not only that the number of plaintiffs be numerous, but also that joinder of plaintiffs in one individual action be impractical. "In general the question of numerosity depends on the particular facts of each case and no arbitrary rules regarding the size of class have been established by the courts." *In re Application of Edward J. Rosewell,* 236 Ill. App. 3d 165, 174, 603 N.E. 2d 681, 686 (1992). Where there are a number of potential claimants, and the individual amount of each claim is small, making redress on an individual level difficult, if not impossible, Illinois courts have been particularly receptive to proceeding on a class action basis. *Miner v. Gillette Co.*, 87 Ill. 2d 7, 428 N.E. 2d 478 (1981), *cert. dismissed*, 459 U.S. 86 (1982).

Testimony at the certification hearing indicates that State Farm's practice of using non-OEM parts affects a large number of policyholders. State Farm is the largest auto insurer in the United States, with over 34 million auto policies in effect nationwide. Affidavit of Kathleen M. Pechan, Defendant's Exhibit 8, p. 3. State Farm paid approximately 5.1 million separate collision and comprehensive claims in 1996. Affidavit of David W. Gibson Jr., Defendant's Exhibit 5, p. 3. In 1993, 49.4% of State Farm's repair estimates nationwide included CAPA certified non-OEM

parts. Plaintiffs' Exhibit 177. It is clear from the exhibits introduced by both Plaintiffs and State Farm that millions of people are affected by State Farm's current claims settlement practices. The Court therefore finds the potential class members are sufficiently numerous.

In reaching its determination that joinder is impracticable the Court is guided by the number of potential class members. The Court finds that, first, the potential class members are widely distributed. Second, the class is large and its members cannot be easily identified, located and informed of the pendency of this action for purposes of formal joinder. Third, the potential class members are average consumers, not "sophisticated" entities. Fourth, the individual damages alleged in this action are, for the most part, small. They involve accelerated vehicle deterioration after repair, inferior fit and finish of repaired areas, and loss of value at resale. The dollar value of individual claims, although not nominal, is not large. *See, e.g.*, Plaintiffs' Exhibit 94 ($1,670 diminution in value upon resale when non-OEM parts used). Finally, it should be noted that this is the type of consumer class action on behalf of smaller claimants to which Illinois courts have been particularly receptive. *Gordon*, 224 Ill. App. 3d at 204, 586 N.E.2d at 467.

The Court finds that more localized litigation, either on an individual or localized class basis, would be a waste of scarce judicial resources both in this and other states. Addressing the common issues in one litigation would aid judicial administration. Therefore, the Court finds that requirements for certification of a class action under 5/2-801(1) are satisfied.

B. Common Questions of Fact or Law

735 ILCS 5/2-801(2) requires that there be "questions of fact or law common to the class." However, "[c]ertification require[s] only that there be either a predominating common issue of law or fact, not both." *Martin v. Heinold Commodities, Inc.*, 117 Ill. 2d 67, 81, 510 N.E. 2d, 840, 846 (1987). While Plaintiffs must demonstrate that the common questions predominate over individual issues,

> "the hypothetical existence of individual issues is not a sufficient reason to deny the right to bring a class action. Where it appears that the common issues is dominant and pervasive, something more than the assertion of hypothetical variations of a minor character should be required to bar the action."

Harrison Sheet Steel Co. v. Lyons, 15 Ill. 2d 532, 538, 155 N.E. 2d 595, 598 (1959). Common questions arising from the interpretation of standard contract provisions or other uniform documents may be found to predominate; accordingly, the inability of some members of the class to obtain relief due to particular factors unique to them, is to be resolved at trial and does not impair certification of the class. *Steinberg*, 69 Ill. 2d at 338, 371 N.E. 2d at 643; *Rosen v. Village of Downer's Grove*, 19 Ill. 2d 448, 456, 167 N.E. 2d 230, 235 (1960).

Testimony at the class certification hearing highlighted the common factual pattern in this case. James Ford, employed by State Farm as a divisional claims superintendent, testified that State Farm's claims policies are communicated through a series of "general claims memos" issued from State Farm's headquarters in Bloomington, Illinois, which governs claims policy nationwide. Certification Hearing at 0120-0124. General Claims Memo #430, introduced at the hearing as Defendant's Exhibit 23, governs the use on non-OEM parts.

In resolving customer claims, an estimate is prepared at a local State Farm claims office. When a particular part is needed to complete a repair, the part number is input into a computer program. This program contains a database maintained by, respectively, Mitchell, C.C.C. or A.D.P., *Id.* at 0142, which contains information on the availability of, and price for, various parts from suppliers State Farm has approved. *Id.* at 0144. The computer's software then automatically searches what was referred to as "the matrix," and locates the cheapest available part. *Id.* at 0143-44. This part, whether it is an OEM or non-OEM part, is then automatically specified on the repair estimate. *Id.* at 0143-44. The State Farm adjuster has no authority to override the computer's choice of the cheapest part. *Id.* at 0153-54. It appears that this

practice is uniform throughout the United States wherever non-OEM parts are used. *Id.* at 0155. Defendant's Exhibit 23. The policyholder is neither informed, nor consulted when a non-OEM part is specified. Certification Hearing at 0132. If the policy holder does not want non-OEM parts placed on their car, they must convince a body shop to absorb the price difference, or pay for the difference in price themselves. *Id.* at 0151.

As to the consumer fraud allegations, the facts presented at the certification hearing on State Farm's methods of disclosing to policyholders its use of non-OEM parts also demonstrates a course of conduct common to all class members. When such parts are used on an estimate, the policyholder is given a State Farm brochure discussing the use of non-OEM parts. Defendant's Exhibit 24; Certification Hearing at 0124-25. The estimate is then stamped indicating the use of non-OEM parts. Defendant's Exhibit 27. State Farm has also promoted the use of the term "quality replacement parts" nationwide in an effort to promote its substitution of non-OEM for OEM parts. Plaintiffs' Exhibits 115, 116.

The Court finds that the evidence introduced at the certification hearing demonstrate "a series of essentially identical transactions," *Miner*, 87 Ill. 2d at 19, 428 N.E. 2d at 484, between State Farm and its insureds, which transactions routinely result in the use of non-OEM parts.

In reaching its conclusions that the class claims are essentially factually identical, the Court acknowledges the significant evidence presented at the hearing regarding the varying availability and use of non-OEM parts in each of State Farm's regional offices. Affidavit of David A. Gibson, Jr., Defendant's Exhibit 5; Certification Hearing at 0121, 0124. The Court notes that varying availability of non-OEM parts affects how many policyholders did or did not receive non-OEM parts, but it does not affect the common pattern with respect to class members, who always received such parts if they were available. Any person whose car was repaired only with OEM parts is not part of the class for which certification is sought. Therefore, any variations in OEM part use is irrelevant to certification.

Given State Farm's common and ongoing course of conduct in repairing its insureds' vehicles with cheaper non-OEM parts whenever these parts were available, potential class members have a common interest in determining State Farm's obligations under its contractual provisions. "A class action can properly be prosecuted where a defendant is alleged to have acted wrongfully in the same basic manner as to an entire class. In such circumstances, the common class questions still dominate the case." *Brooks v. Midas-International Corp.*, 47 Ill. App. 3d 266, 273, 361 N.E. 2d 815, 820 (1977). Here the class members have a common interest in determining if State Farm's policy violates its contractual obligations, and this issue of contractual interpretation predominates over other issues. *See, e.g., Carrao v. Healthcare Service Corp.*, 118 Ill. App. 3d 417, 428, 454 N.E. 2d 781, 790 (1983). Similarly, the question of whether State Farm's practice of using non-OEM parts constitutes a violation of the CFA is a common issue appropriate for resolution. *See, e.g., Brooks*, 47 Ill. App. 3d at 272, 361 N.E. 2d at 820.

In determining if this common question predominates, the Court has carefully considered State Farm's contention that it has no standard form auto insurance policy, as each individual state's policy is tailored to comply with the requirements of that state. *See* Affidavit of Everett J. Truttmann, Defendant's Exhibit 9. Therefore, State Farm contends there is no common question to be interpreted. The Court finds, however, that the policies specific form is immaterial, provided that the operative contractual language contained in each policy is susceptible to uniform interpretation. Whether particular language in its policies authorizes State Farm's use of non-OEM parts or is in conflict with the "like kind and quality" or "pre-loss condition" language of the policies is not a question to be resolved during class certification. It is a question for resolution on the merits.

State Farm has placed particular emphasis on its practice of using CAPA-certified non-OEM parts. Under this practice, State Farm will specify only a CAPA-certified part in place of an OEM part when that type of part was subject to CAPA certification. Affidavit of David A. Gibson, Jr., Defendant's Exhibit 5, p. 8. Although considerable testimony was received as to the difference

between CAPA-certified non-OEM parts, non-CAPA-certified non-OEM parts, and OEM parts, this testimony all addresses the merits of whether non-OEM parts satisfy State Farm's contractual obligations. This ultimate issue is irrelevant to class certification, where the common treatment of the class members in having received non-OEM parts is the central question.

The Court heard substantial testimony as to the number of different non-OEM parts. Since the Court finds that a common question concerning the use of non-OEM parts has been established, the number of different parts and their relative quality is a question that goes to the merits of whether non-OEM parts are equal to OEM parts. Plaintiffs submissions that non-OEM parts are categorically inferior in performance and safety, because of inferior design, manufacture and quality control, and evidence that they are commonly perceived by the marketplace as inferior, with a resulting negative effect on policyholders' cars' ultimate resale value are factors in the Court's determination that the requirements of 2-801(2) have been established.

In *Phillips Petroleum Co. v. Shutts*, the United States Supreme Court discussed the constitutional limitations on the application of a particular state's substantive law to the claims of out-of-state plaintiffs, finding that a state may apply its substantive law beyond its borders where it has "'significant contact or significant aggregation of contracts' to the claims asserted by each member of the plaintiff class, contacts 'creating, state interests'*** insur[ing] that the choice of [law] is not arbitrary or unfair." 472 U.S. 797, 821-22, 105 S. Ct. 2965, 2979 (1985) (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-12, 101 S. Ct. 633, 640 (1981). Illinois courts have approved the application of the CFA, § 815 ILCA 505/1 *et seq.*, to the claims of out-of-state plaintiffs. *See, e.g., Gordon*, 224 Ill. App. 3d at 202-03, 586 N.E. 2d at 466; *Martin* 117 Ill. 2d 67, 510 N.E.2d 840. In *Martin*, a class composed of in state and out-of state plaintiffs sued an Illinois corporation for fraud and for violations of the Illinois CFA. Relying upon *Phillips*, the Illinois Supreme Court noted that defendant's principal place of business was Illinois and stated:

> "Applying the Phillips Petroleum standard to the instant case, it is apparent that Illinois substantive law can be applied to resolve the underlying common factual dispute. Here each member of the plaintiff class asserts the same breach of defendant's fiduciary duty with regard to the same nondisclosure of the same fact. This common allegation implicates the legitimate interests of the State of Illinois in insuring that persons and entities within its jurisdiction, insofar as they undertake to act as agents, do so in accordance with its law." 117 Ill. 2d at 82, 510 N.E.2d at 847.

The Illinois Supreme Court concluded that "there can be no doubt that the claim of each member of the plaintiff class implicates the legitimate interests of Illinois in applying its law to adjudicate a dispute involving a business principally situated in its jurisdiction and which, by its own efforts, insistently has sought to avail itself of both the courts and the laws of the forum State." 117 Ill. 2d at 83, 510 N.E.2d at 847. Under *Phillips* and *Martin*, given the fact that State Farm is situated and headquartered in Illinois and affirmatively uses Illinois courts and law, this Court could apply Illinois substantive laws, including the CFA to the entire class.

While it is not necessary for the Court at this time to decide upon choice of law as to the breach of contract claim, it does note that the eventual decision as to choice of law will not prevent the certification of the Class in this case. *Gordon*, 224 Ill. App. 3d at 202, 586 N.E.2d at 466. The Court retains the right to divide the litigation into a manageable number of sub-classes under 2-802(b) should differences in law present themselves. The Court finds that the requirements of Section 2-801(2) are met as "common issues of fact or law predominate."

C. <u>The Representative Plaintiffs Fairly and Adequately Protect the Interest of the Class</u>

735 ILCS 5/2-801(3) conditions class certification upon a finding that "[t]he representative parties will fairly and adequately protect the interest of the class." "The purpose ... of the adequate representation requirement is merely to ensure that all class members will receive proper, efficient, and appropriate protection of their interests in the presentation of the claim." *Gordon*, 224 Ill.

App. at 203, 586 N.E. 2d at 466. Judicial evaluation of the quality of the representation, as well as class certification in general, rests within the sound discretion of the trial court. *McCabe v. Burgess*, 75 Ill. 2d 457, 464, 389 N.E. 2d 565, 568 (1979).

Adequate representation assures compliance with due process requirements. "The test applied to determine the adequacy of representation is whether the interests of those who are parties are the same as those who are not joined and whether the litigating parties fairly represent those not joined." *Miner*, 87 Ill. 2d at 14, 428 N.E.2d at 482. Essentially, the determination focuses on whether the absentee members are so represented by the persons before the court "that their interests will receive actual and efficient protection." *Brooks*, 47 Ill. App. 3d at 274, 361 N.E. 2d at 820, quoting *State Life Insurance Co. v. Board of Education*, 394 Ill. 301, 308, 68 N.E.2d 525, 529 (1946). Finally, unlike Federal Rule Of Civil Procedure 23, there is no "typicality" requirement in 5/2-801(3). The Illinois rule is more liberal than the federal rule in this regard and "...a class representative may not be disqualified merely because his claim is not exactly the same as the claims of other potential class members." *Carrao*, 118 Ill. App. 3d at 428, 454 N.E.2d at 790. The Court finds that the requirement of adequate representation under 735 ILCS 5/2-801(3) has been satisfied.

After a rigorous analysis of Plaintiffs' Complaint, Plaintiffs' affidavits and Plaintiffs' counsels' affidavits or resumes, the Court concludes that Plaintiffs have zealously pursued their claims since learning of State Farm's alleged wrongful conduct and that Plaintiffs have sufficient financial resources to absorb the expenses involved in being the named representatives. The Court further finds that no conflicting interests exist between Plaintiffs and the Plaintiff Class as it is clear from the Court's review of the material submitted in support of class certification that the representatives herein and Class members share common objectives and legal and factual positions. Other than the dates and specific amounts concerning Plaintiffs' repairs and Class members' repairs, the proof, objectives, legal and factual positions will be essentially identical from plaintiff to plaintiff and class member to class member.

In determining the adequacy of representation, the Court may also consider the quality and experience of the attorneys for the Class. The Court finds, after a rigorous analysis and review of the pleadings and resumés submitted by Plaintiffs' counsel and having observed their conduct in open Court, that they are able advocates for the Class. Counsel for Plaintiffs have regularly engaged in major complex consumer litigation of size, scope and complexity similar to this case. Counsel have successfully prosecuted many and varied class actions or other complex litigation. They have the experience and sophistication that the Plaintiffs and Class members lack. The Court finds that counsel for Plaintiffs are well suited for this case and that Plaintiffs will fairly and adequately protect the interest of the Class in compliance with the mandate of 735 ILCS 5/2-801(3).

D. <u>The Class Action is an Appropriate Method to Resolve the Class Issues</u>

735 ILCS 5/2-801(4) conditions class certification on a finding that "[t]he class action is an appropriate method for the fair and efficient adjudication of the controversy." In applying the fourth prerequisite, the Court has considered whether a class action can best secure economies of time, effort, and expense and promote uniformity of decision or accomplish other ends of equity and justice. *Gordon*, 224 Ill. App. 3d at 203, 586 N.E.2d at 467. While Federal Rule Of Civil Procedure 23(b)(3) requires that a class action be *superior* to the available methods of adjudication, the Illinois statute requires that the trial court find that the class action is an *appropriate* method of litigating the controversy. Section 5/2-801(4). This standard allows the trial court a more flexible measure of discretion in determining whether to permit the class action to proceed. A significant factor in the case at bar is that a class action is the only practical means for State Farm policyholders to present their claims and for State Farm to achieve finality as to their claims.

Illinois courts have historically recognized that class actions are an appropriate method of fairly and efficiently adjudicating controversies involving numerous small claims. In *Wood River Area Development Corporation v. Germania Federal Savings and*

Loan, 198 Ill. App. 3d 445, 452; 555 N.E.2d 1150, 1154 (1990), the Court stated "[t]he class action is particularly appropriate where those who have allegedly been insured 'are in poor position to seek legal redress, either because they do not know enough or because such redress in disproportionately expensive.' ...Its 'historic mission' has been to take care of the smaller guy." The *Wood River* court concluded,

> "No matter how refined, how revised, or how evolved" [the class action becomes], "...the goal of the class action remains the same — justice for the lowly, the tenants, the parishioners, the multitudes." 198 Ill. App. 3d at 448, 555 N.E.2d at 1152.

The United States Supreme Court recently acknowledged not only the appropriateness, but the necessity, of class treatment of small consumer claims in *AmChem Prods. Inc. v. Windsor*, ___ U.S. ___, 117 S. Ct. 2231, 2250 (1997), stating,

> "Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws."

With respect to "small claims" class actions in general, the Court stated:

> "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." 117 S.Ct. at 2246, quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997).

The evidence presented to the Court supports the conclusion that, not only is a class action an appropriate method for the fair adjudication of the disputes between Defendant State Farm and its millions of automobile insurance policyholders, but also that it may be the only means by which these disputes may be efficiently resolved.

Defendant State Farm provides automobile insurance coverage to one out of every five insured drivers in the United States, making it the nation's number one auto insurer. Plaintiffs' Exhibit 102. The evidence submitted by Plaintiffs indicates that State Farm achieved a savings of $32 million in 1994 from the use of non-OEM parts. Plaintiffs' Exhibit 92. Accordingly, this action qualifies for class resolution both in terms of the dollar amount in controversy and the number of claims involved.

State Farm has previously settled two lawsuits challenging its non-OEM parts practices — the Illinois case entitled *Krusinski v. State Farm*, No. 87 CH 10253, in the Circuit Court of Cook County ("Krusinski"), and the California case entitled *Krinsk v. State Farm Mutual Automobile Insurance Company*, No. 626412, in San Diego County Superior Court ("*Krinsk*"). Defendant's Exhibit 1. State Farm has settled both the *Krusinski* and *Krinsk* actions but has continued its practice of utilizing non-OEM parts in its repairs of policyholders' vehicles. In addition to other relief, Plaintiffs at bar seek an injunction prohibiting State Farm from continuing its practice of settling policyholders' repair claims based upon the use and cost of non-OEM parts.

Proof of Plaintiffs' claims against Defendant State Farm may be made on a class-wide basis. After a rigorous review of the pleadings, exhibits and affidavits submitted by Plaintiffs, the only proof that might differ from Plaintiff to Plaintiff and class member to class member would appear to be the amount of damages suffered by each class member. It is well settled, in Illinois and elsewhere, that differences in the amounts of damages suffered by individual class members will not defeat class certification. *Gordon*, 224 Ill. App. 3d at 202, 586 N.E.2d at 465-66. Individual lawsuits for small amounts would be too expensive, and absent a class action, individual lawsuits run a substantial likelihood of inconsistent adjudications. Upon consideration for the pleadings, exhibits and affidavits submitted by Plaintiffs, the Court concludes that the proposed Class is manageable. The Court concludes, pursuant to 735 ILCS 5/2-801(4), that a class action is an appropriate method for the fair and efficient adjudication of this controversy.

IV. CONCLUSION

Pursuant to 735 ILCS 5/2-801, this Court concludes that Plaintiffs have adequately satisfied the four requirements for class certification of this action under Illinois law. Plaintiffs will now have the opportunity to try and prove the merits of their claims, which is an entirely different matter from establishing the requirements for class certification. The Court notes that class certification will allow all State Farm policyholders to seek redress for their claims and will also provide State Farm with finality as to the claims. State Farm has, for years, had class actions filed against it concerning the matters involved in this litigation and has been forced to defend itself in numerous jurisdictions. Since this case has ben filed, the parties have made the Court aware of several cases which have recently been filed, including the *Dorries* action in Champaign County, Illinois (No. 97-L-188), which has not been terminated by Judge Green's November 10, 1997 order in "*Krusinski*". The Court has learned that the attorneys prosecuting the *Dorries* case in Illinois had also filed an identical class action case in Alabama. Such a multiplicity of suits is an inefficient use of judicial resources and places State Farm in the unenviable position of trying to defend itself on multiple fronts.

The Court believes that Illinois is the one State where a national class can be maintained and where all issues between State Farm and State Farm's policyholders concerning the use of non-OEM parts can finally be resolved. The Court is unaware of any other class action cases pending in Illinois concerning the issues involved in this litigation and is unaware of any other class action case in any other State which has certified a national class after a full evidentiary hearing on class certification.

The following described Plaintiff Class is hereby ordered certified for purposes of litigation and trial:

> All persons in the United States, except those residing in Arkansas and Tennessee, who (1) were insured by a vehicle casualty insurance policy issued by Defendant State Farm and (2) made a claim for vehicle repairs pursuant to their policy and had imitation that is, non-factory-authorized and/or non-OEM parts installed on their vehicles or else received

monetary compensation determined in relation to the cost of imitation parts. Excluded from the class are employees of Defendant State Farm, its officers, its directors, its subsidiaries, or its affiliates.

In addition, the following persons are excluded from the class: (1) persons who resided in Illinois and whose policies were issued/executed prior to April 16, 1994, and (2) persons who resided in California and whose policies were issued/executed prior to September 26, 1996.

ENTERED: December 5, 1997

John Speroni
Associate Circuit Judge

APPENDIX C

IN THE CIRCUIT COURT FOR THE
FIRST JUDICIAL CIRCUIT
WILLIAMSON COUNTY, ILLINOIS

No. 97-L-114

TAMMY SNIDER AND MICHAEL AVERY,
ON BEHALF OF THEMSELVES AND
ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant.

AMENDMENT TO ORDER AND FINDINGS THAT ACTION MAY BE MAINTAINED AS A CLASS ACTION FOR BREACH OF CONTRACT, CONSUMER FRAUD AND EQUITABLE RELIEF CLAIMS

On December 5, 1997, this court entered an Order And Findings That Action May Be Maintained As A Class Action For Breach Of Contract, Consumer Fraud And Equitable Relief Claims. It is clear to the court that this case is about "crash parts", not all parts of a vehicle. The court, after considering the arguments of counsel (made December 29, 1997) and written submissions of counsel (filed February 5, 1998 and February 6, 1998), finds that the Plaintiff Class certified by the court in its December 5, 1997 Order should be modified and revised in certain respects, including, without limitation, in regard to the term "crash parts" and the term "OEM" which means "Original Equipment Manufacturer".

WHEREFORE IT IS ORDERED THAT the last paragraph of the court's Order And Findings That Action May Be Maintained As A Class Action For Breach Of Contract, Consumer Fraud And Equitable Relief Claims (entered December 5, 1997), which provides:

"The following described Plaintiff Class is hereby ordered certified for purposes of litigation and trial:

> All persons in the United States, except those residing in Arkansas and Tennessee, who (1) were insured by a vehicle casualty insurance policy issued by Defendant State Farm and (2) made a claim for vehicle repairs pursuant to their policy and had imitation that is, non-factory-authorized and/or non-OEM parts installed on their vehicles or else received monetary compensation determined in relation to the cost of imitation parts. Excluded from the class are employees of Defendant State Farm, its officers, its directors, its subsidiaries, or its affiliates.
>
> In addition, the following persons are excluded from the class: (1) persons who resided in Illinois and whose policies were issued/executed prior to April 16, 1994, and (2) persons who resided in California and whose policies were issued/executed prior to September 26, 1996."

be and the same is hereby amended to provide:

"The following described Plaintiff Class is hereby ordered certified for purposes of litigation and trial:

> All persons in the United States, except those residing in Arkansas and Tennessee, who (1) were issued by a vehicle casualty insurance policy issued by Defendant State Farm and (2) made a claim for vehicle repairs pursuant to their policy and had non-factory-authorized and/or non-OEM (Original Equipment Manufacturer) "crash parts" installed on their vehicles or else received monetary compensation determined in relation to the cost of such parts. Excluded from the class are employees of Defendant State Farm, its officers, its directors, its subsidiaries, or its affiliates.

In addition, the following persons are excluded from the class: (1) persons who resided or garaged their vehicles in Illinois and whose Illinois insurance policies were issued/executed prior to April 16, 1994, and (2) persons who resided in California and whose policies were issued/executed prior to September 26, 1996.

"Crash parts" are vehicle components typically repaired or replaced as a result of crash damage rather than as a result of normal vehicle usage. The non-factory-authorized and/or non-OEM crash parts involved in this Plaintiff Class are of the following types: 1) fenders, 2) hoods, 3) doors, 4) deck lids, 5) luggage lid panels, 6) quarter panels, 7) rear outer panels, 8) front end panels, 9) header panels, 10) filler panels, 11) door shells, 12) pickup truck beds, box sides, and tail gates, 13) radiator/grill support panels, 14) grilles, 15) head lamp mounting panels/brackets/housings/lenses/doors, 16) tail lamp mounting panels/brackets/housings /lenses, 17) outer body mouldings, 18) door body side moulding, 19) front wheel opening mouldings, 20) side mouldings, 21) front and rear fascias, 22) outer panel mounting brackets, supports and surrounds, 23) bumpers (excluding chrome bumpers), 24) bumper covers/face bars, and 25) bumper brackets/supports."

ENTERED: February 11, 1998

JOHN SPERONI
ASSOCIATE CIRCUIT JUDGE

APPENDIX D

IN THE CIRCUIT COURT FOR THE
FIRST JUDICIAL CIRCUIT
WILLIAMSON COUNTY, ILLINOIS

No. 97-L-114

TAMMY SNIDER, AND MICHAEL AVERY,
ON BEHALF OF THEMSELVES AND
ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant.

ORDER SETTING EXCLUSION REQUEST DEADLINE, APPROVING FORM OF NOTICE OF CLASS CERTIFICATION, AND DIRECTING IMPLEMENTATION OF NOTICE PLAN

THIS CAUSE CAME ON for hearing on Plaintiffs' Motion for Order Approving Form of Notice and Directing Notice of Class Certification. The court, having considered the notice plans presented by both parties, the parties' arguments, memorandums, briefs, supporting affidavits and the record in this case, and being duly advised in the premises, FINDS as follows:

1. On February 11, 1998, this court entered an Amendment To Order (of December 5, 1997), confirming certification of a plaintiff class. The court has approved the definition of the class as follows:

> All persons in the United States, except those residing in Arkansas and Tennessee, who (1) were insured by a vehicle casualty insurance policy issued by Defendant State Farm and

(2) made a claim for vehicle repairs pursuant to their policy and had non-factory-authorized and/or non-OEM (Original Equipment Manufacturer) "crash parts"[1] installed on their vehicles or else received monetary compensation determined in relation to the cost of such parts. Excluded from the class are employees of Defendant State Farm, its officers, its directors, its subsidiaries, or its affiliates."

In addition, the following persons are excluded from the class: (1) persons who resided or garaged their vehicles in Illinois and whose Illinois insurance policies were issued/executed prior to April 16, 1994, and (2) persons who resided in California and whose policies were issued/executed prior to September 25, 1996.

2. Pursuant to 735 ILCS 5/2-803, upon the determination that an action may be maintained as a class action, or at any time during the conduct of the action, the court in its discretion may order such notice that it deems necessary to protect the interests of the class and the parties.

3. The court has considered Plaintiffs' proposed Notice Plan, the objections thereto, and State Farm's Notice Plan which calls for direct mailed notice to persons on lists generated from either State Farm's computer estimating system or claims records, supplemented by limited published notice.

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[1] "Crash parts" are vehicle components typically repaired or replaced as a result of crash damage rather than as a result of normal vehicle usage. The non-factory-authorized and/or non-OEM crash parts involved in this Plaintiff Class are of the following types: 1) fenders, 2) hoods, 3) doors, 4) deck lids, 5) luggage lid panels, 6) quarter panels, 7) rear outer panels, 8) front end panels, 9) header panels, 10) filler panels, 11) door shells, 12) pickup truck beds, box sides, and tail gates, 13) radiator/grill support panels, 14) grilles, 15) head lamp mounting panels/brackets/housings/lenses/doors, 16) tail lamp mounting panels/brackets/housings/lenses, 17) outer body moldings, 18) door body side molding, 19) front wheel opening moldings, 20) side moldings, 21) front and rear fascias, 22) outer panel mounting brackets, supports and surrounds, 23) bumpers (excluding chrome bumpers), 24) bumper covers/face bars, and 25) bumper brackets/supports.

4. Plaintiffs' proposed Notice Plan includes three primary elements. First, the court-approved Class Action Notice would be placed in over 850 newspapers across the country, through insertion into the USA Weekend, Parade and Sunday supplements, as well as placement of the Class Action Notice in several of the most widely-read national publications, including *People*, the *National Enquirer/Star*, *Money*, *USA Today* and *U.S. News & World Report*. These publications were carefully selected by Plaintiffs' notice expert Todd Hilsee so as to mirror the class members and insure no demographic group among State Farm insureds receives inadequate notice.

5. Plaintiffs' proposed Notice Plan supplements this published notice through implementation of a press campaign to generate "earned media" coverage of the certification decision (which has already commenced), the issuance of notice, and the setting of a trial date. "Earned media" will involve distribution of notice and information on the ongoing litigation to 10,000 newspapers, 6,500 radio stations, and 1,000 television stations, including a special automotive wire.

6. Finally, Plaintiffs propose to provide notice on the Internet. This will be accomplished through an actively promoted Internet Web Site, which will be registered with internet search engines and promoted through Banner advertising. The court's orders and other notice materials will be able to be read and downloaded from this site. Individual class members will also be able to post their names and addresses for future communications.

7. Plaintiffs' proposed schedule of publications and notice efforts throughout the eight week notice period are carefully designed to reach all class members reasonably practicable. Plaintiffs comprehensive publication notice plan will cost upwards of $400,000 in direct costs.

8. The court has carefully considered the affidavits of Plaintiffs' notice expert Todd Hilsee as to the effectiveness of this plan. Mr. Hilsee is a qualified notice expert who has developed notice plans for many of the most significant recent federal and state class action cases. His curriculum vitae indicates that his

experience has included developing notice plans for a number of consumer class actions similar to this litigation.

9. Prior to developing classwide notification plans, Mr. Hilsee worked in the advertising industry and his opinions as to the effectiveness of Plaintiffs' proposed Notice Plan are based on survey research techniques used to measure an advertising plan's effectiveness. This court's opinion as to Mr. Hilsee's credibility, and the scientific basis of his opinions is bolstered by the findings of other judges that Mr. Hilsee's testimony is credible. See, e.g. *In re Domestic Air Transportation Antitrust Litigation*, 141 F.R.D. 534, 548 (N.D. Ga. 1992). As did Judge Shoob in the *Domestic Air* case, this court, having carefully considered all of the submissions, and reviewed their basis, finds Mr. Hilsee's testimony to be credible. Mr. Hilsee carefully and conservatively testified to the reach of Plaintiffs' proposed Notice Plan, supporting the reach numbers with verifiable data on publication readership, demographics and the effect that overlap of published notice would have on the reach figures.

10. Mr. Hilsee's opinion that Plaintiffs' proposed Notice Plan will have a "net reach" of at least 76.4% of the potential class members through the publication plan, Hilsee Supp. Aff. at ¶ 17, is supportable and verifiable. The "net reach" of Plaintiffs' proposed Notice Plan among State Farm insureds who have had auto parts recently installed is slightly higher at 76.7%. *Id.* This indicates to the court that the plan developed by Plaintiffs is particularly well-targeted at class members. The conservatism of these "reach" numbers is highlighted by the fact that they do not include the effect of Plaintiffs' proposed media and internet activities as the additional reach those activities provide can not be scientifically verified at this time.

11. In support of Plaintiffs' proposed Notice Plan Mr. Hilsee has also noted that because class members may see more than one copy of a published notice (if they read several publications) Plaintiffs' proposed Notice Plan will actually allow each class member an opportunity to view the notice an average of 1.5 times. *Id.* at ¶ 20. The notice provided by the Plaintiffs' proposed Notice Plan is therefore of high quality.

12. In opposition to Plaintiffs' proposed Notice Plan, State Farm presented the court with an affidavit by Richard C. Hoyt, Ph.D., who is the president of a claims administration and economic consulting firm. Dr. Hoyt contends that based upon his firm's experience, the response rate to direct individualized (mailed) notice over published notice is 15 to 20 times greater. Hoyt Aff. at ¶ 5. He further contends that a class member is much more likely to become aware of a notice personally addressed to him than he is to read a notice in a publication. *Id.* Dr. Hoyt's conclusions as to the efficiency of publication notice appear to be based solely upon his firm's experience. The court notes that his opinion does not appear to be based on verifiable data, nor does Dr. Hoyt's experience appear to have been in affording notice of the pendency of a class action and the right to opt out, but rather is in settlement administration. When compared to Mr. Hilsee's carefully considered reach numbers based upon verifiable survey research data, this court concludes that it should discount Dr. Hoyt's opinions as lacking an adequate basis.

13. Dr. Hoyt's challenge to the Plaintiffs' reach statistics is further undercut by evidence presented at the notice hearing based upon United States Postal Service Household Diary Studies that a large portion of mail sent by state and local governments is neither read nor responded to and by additional survey data presented at the hearing. Having carefully considered the various affidavits on the issue, this court finds that the figures as to the reach of Plaintiffs' proposed Notice Plan are conservative and verifiable. Plaintiffs' proposed Notice Plan is carefully tailored to the particular circumstances of this case.

14. As an alternative to Plaintiffs' proposed Notice Plan, State Farm has presented a Notice Plan based upon the contention of State Farm that individual mailed notice is required in this case. Based upon State Farm's position that individual mailed notice is required, State Farm contends that an appropriate mailing list can be generated. State Farm supports its contentions with affidavits filed by John V. Werner, State Farm's Assistant Director of Research in State Farm's Research Department.

15. First, State Farm proposes to generate a list of those State Farm insureds whose vehicle repair estimates specify one or more

non-OEM crash parts included in the class definition. This list would be derived from State Farm's computer estimation system. According to Mr. Werner's affidavit, this estimating system only includes some of the class member's claims. Second Supp. Aff. of John Werner at ¶ 4. Based upon the current class definition and the court's adoption of a crash part definition, State Farm contends that any list generated from the computer estimating system would include approximately 36% of State Farm's policyholders whose vehicle repair estimates listed one or more of the non-OEM crash parts included in the class definition. *Id.* at ¶ 9. By State Farm's own admission, such a list would be under inclusive and would therefore fail to provide mailed notice to a huge number of class members. *Id.* at ¶ 9. Such a list would include, according to State Farm, approximately 1.8 million policyholders who are class members. *Id.* at ¶ 11.

16. State Farm also proposes to generate a list of *virtually all* policyholders who have asserted property damage claims against State Farm since 1987. State Farm admits this list would be over inclusive as only approximately 27% of the persons on this list would be class members. *Id.* at ¶ 10. This over inclusive list would contain the names and addresses of approximately 19.1 million policyholders. *Id.* at ¶ 11. Such a mailing would mislead huge numbers of recipients into thinking they were part of the class when such is not the case, and would be wasteful and unreasonably costly.

17. Neither of the proposed lists for use for individual mailed notice appears to accurately track the members of the class. This problem is highlighted by State Farm's inability to tell the court that it will be able to obtain current addresses for a number of individuals. As noted by Mr. Werner, State Farm's records probably would not contain the current addresses of individuals who moved after dropping State Farm as their insurer. *Id.* at ¶ 15. The court is particularly troubled by possible inaccuracies in the list generated by State Farm based upon evidence presented at the notice hearing that according to U.S. Census Bureau data, approximately 16% of the population moved between March 1996 and March 1997. This rate of address change appears to be

consistent during the entire class period and would rapidly make any list generated by State Farm inaccurate.

18. The court therefore finds that State Farm has not presented, and is not able to present, a reasonably accurate list of potential class members from its records. Any list generated by State Farm would either be inaccurate and over inclusive or inaccurate and under inclusive. Further, State Farm has also failed to present the court with any scientifically verifiable facts which indicate that the reach of their proposed mailing (if it could be done accurately) and limited publication notice plan equals or surpasses the reach of Plaintiffs' proposed Notice Plan. Given the lack of fit between State Farm's two proposed mailing lists and the class members, mailing to this list would not be "practicable" under Illinois law, nor would it be superior to Plaintiffs' proposed Notice Plan. State Farm has entirely failed to convince the court that a reasonably accurate and comprehensive list of class members can be generated in this case.

19. The court is aware that notice in this case must be tailored to the particular circumstances here, which include the following: (1) there are millions of class members dispersed throughout the United States; (2) mailed notice is impracticable, unreasonably expensive, and ineffective; (3) the class members' claims, individually, are of relatively small value; (4) notice can effectively be disseminated through a publication campaign, achieving the same "reach" as mailed notice, but with greater frequency and impact, and at a reasonable cost of approximately $450,000. See e.g., *Miner v. Gillette Co.*, 87 Ill. 2d 7, 15 (1981) (the "circumstances of the individual action" govern the court's exercise of discretion regarding the kind of notice to require); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (to satisfy due process, the "best practicable" notice should be provided; that is, notice which is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections").

20. Based upon a careful examination of the evidence submitted by both parties, the court finds that Plaintiffs' proposed Notice Plan, which includes nationwide publication, at a small fraction of the cost of State Farm's proposed Notice Plan, will have

a superior ability to reach and provide essential information to the class. The court further finds that under the particular circumstances of this case mailed notice is impracticable, and that Plaintiffs' proposed Notice Plan provides the "best practicable" notice which is reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

21. State Farm contends that mailed notice to its list is required. This Court has therefore carefully considered the Plaintiffs' and State Farm's proposed Notice Plans in the context of whether mailed notice is required by either Illinois law or due process concerns.

22. As noted in *Miner v. Gillette Co.*, 87 Ill.2d 7, 15 (1981) "[t]he question of what notice must be given to absent class members to satisfy due process necessarily depends upon the circumstances of the individual action." This flexible, pragmatic approach to notice under Illinois law is clearly stated in *Frank v. Teachers Insurance and Annuity Association of America*, 71 Ill.2d 583, 592 (1978) where the court noted that "[we] believe that the trial court's consideration of all of the circumstances of the case before it was appropriate in determining whether the additional protection of notice was required by due process...." Prior Illinois cases have required individual mailed notice when particular circumstances such as the potential for a conflict of interest between the named Plaintiffs and others in the class require it, see *Frank*, 71 Ill. 2d at 596; *Hamer v. Board of Education*, 52 Ill. App. 3d 531, 535 (2nd Dist. 1977), or other unusual circumstances occur. Illinois authorities have also required individual mailed notice, based upon the circumstances of the case, when there is a complete and accurate list of *each* class member and their address. See *Miner*, 87 Ill. 2d at 15 ("[we] believe that in the present circumstances, where the identity and address of each class member is readily accessible by use of the defendant's files, individual notice is required....").

23. The court finds there are no conflicts within this class so as to acquire individual mailed notice. Further, State Farm has not demonstrated to the court that it can generate a list, including *each*

class member, which is accurate so that mailing to such a list is the best notice practicable under Illinois law. Under existing Illinois law, Plaintiffs are not required to provide individual mailed notice to the persons who would be on the inaccurate and incomplete lists which would be generated by State Farm. Such an act would not be the best notice practicable in this case. See *In re Domestic Air Transportation Antitrust Litigation*, 141 F.R.D. 534 (N.D. Ga. 1992).

24. This court also finds that due process does not require individual mailed notice under the circumstances of this case. The flexible notice requirement embodied in the Illinois decisions is consistent with *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). In that case, Justice Jackson, speaking on the requirements of the Due Process Clause noted that "...at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Id.* at 313. Nothing in *Mullane* requires individual mailed notice be afforded to an inaccurate and incomplete list of class members, especially given the equally or more effective published notice campaign which can be implemented in this case. See also, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985) (adopting *Mullane* test as constitutional requirement for due process; notice must be "best practicable").

25. State Farm's reliance upon *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) for the proposition that individual *mailed* notice is required is misplaced. *Eisen* interprets Federal Rule of Civil Procedure 23(c)(2), which specifically directs individual notice in certain circumstances, and which is *less flexible* than 735 ILCS 5/2-803, which provides Illinois state courts with considerably more discretion to determine what kind of notice is required in a particular case. In *Frank v. Teachers Insurance Annuity Association of America*, 71 Ill. 2d 583, 594 (1978) the Illinois Supreme Court "recognized that although 'notice to absent class members as it relates to due process was discussed in *Eisen*, that constitutional requirement was not the basis of the *Eisen* decision.'"; see also, *Cartt v. Superior Court*, 50 Cal. App. 3d

960, 968 (1975) (if Supreme Court intended *Eisen* to refer to other than Rule 23 it could have so held).

26. Relying upon *Miner*, *Frank*, and the United States Supreme Court's decision in *Mullane*, the court finds that Plaintiffs' proposed Notice Plan satisfies due process, is the best notice practicable, and is tailored to fit the unique circumstances of this case.

27. Plaintiffs' proposed form of Class Action Notice has been revised by the court and the Class Action Notice (as revised by the court and attached hereto as Exhibit A), provides to class members all the essential information they need in order to make an informed and meaningful decision regarding whether to remain class members in this case.

28. The Federal Judicial Center's *Manual for Complex Litigation* (3d ed. 1995), § 30.211, identifies the core information which a notice of class action should convey to allow class members to make an informed decision regarding whether they will participate in the class. According to the *Manual*, the notice should: (1) describe succinctly and simply the substance of the action and the positions of the parties; (2) identify the opposing parties, class representatives and counsel; (3) indicate the relief sought; (4) explain any special risks of class members, such as being bound by the judgment, while emphasizing that the court has not ruled on the merits of any claims or defenses; and (5) describe clearly the procedures and deadlines for opting out. The Class Action Notice (Exhibit A) contains all of this essential information, and allows all class members to make an informed and meaningful decision regarding whether to remain class members, and to be bound by any judgment rendered in this action.

29. As noted in the court's December 5, 1997 order, the *Snider* class definition was specifically designed so as to exclude members of the Illinois *Krusinski* class and the *Krinsk* settlement in California. The court therefore finds that the class as defined in this case expressly excludes members of both of these prior class action settlements, and they are therefore not involved in this ongoing litigation before this court. The court further finds that the

Class Action Notice (Exhibit A) gives full notice of the exclusions from the certified class.

30. The court rejects State Farm's proposal to regulate post-notice communications between class members and class counsel. State Farm has failed to provide any evidence which would justify inhibiting communications between class counsel and members of the class who contact class counsel for advice and information.

31. The notice period proposed by Plaintiffs is sufficient. The notice campaign is to commence upon entry of this order, and will run through the opt-out date, which is set herein at June 5, 1998.

32. The Class Action Notice (Exhibit A) and the Plaintiffs' proposed Notice Plan (with revisions made by the court as set forth in paragraph 34 of this Order) comport with the requirements of 735 ILCS 5/2-803, satisfy Constitutional Due Process, are hereby approved by the court and are referred to hereafter as the Class Action Notice (Exhibit A) and Notice Plan (Exhibit B).

33. No evidence was presented that demonstrates the superiority of any alternative to the Notice Plan (Exhibit B), or which in any way casts reasonable doubt on the effectiveness of the Notice Plan (Exhibit B). State Farm has not demonstrated that any alternative to the Notice Plan (Exhibit B) is feasible, practicable, or cost-effective.

34. The revisions to the Notice Plan (Exhibit B) are as follows:

a. The Class Action Notice (Exhibit A) is to be used in all instances instead of the Class Action Notice found in "25. Draft Form of Notices" of the Notice Plan (Exhibit B).

b. The "Press Release" attached hereto as Exhibit C is to be used in all instances instead of the [Draft] Press Release found in "26. Draft Form of Press Release" of the Notice Plan (Exhibit B).

c. The 3 NAPS Releases, each attached and marked as Exhibit D, are to be used in all instances instead of the 3 NAPS Releases found in "28. Draft Form of NAPS

Release" of the Notice Plan (Exhibit B). No cartoons of any type are to be used.

WHEREFORE IT IS ORDERED THAT:

(a) The Class Action Notice (Exhibit A) is hereby approved for publication in the form and text as set forth in Class Action Notice (Exhibit A).

(b) The Notice Plan (Exhibit B) is also approved, as revised pursuant to Paragraph 34 of this Order. Implementation of the Notice Plan (Exhibit B) shall commence after the date of this Order.

(c) The postmark deadline for submission of requests for exclusion from the class shall be June 5, 1998, which shall provide class members with more than 47 days notice of the exclusion deadline. This court recognizes the right of potential class members to exclude themselves from the class conditioned upon compliance with the procedures and deadlines set forth in the Class Action Notice (Exhibit A) and the right of individuals who have filed timely exclusion requests to commence or continue the prosecution of individual actions against State Farm.

ENTERED: February 11, 1998

JOHN SPERONI
ASSOCIATE CIRCUIT JUDGE

MOTION FILED

AUG 19 1998

No. 97-2063

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

THE HONORABLE JOHN SPERONI, TAMMY SNIDER AND MICHAEL AVERY,

Respondents.

On Petition for a Writ of Certiorari to the Illinois Supreme Court

MOTION AND BRIEF OF AMICI CURIAE PUBLIC CITIZEN, INC., THE CENTER FOR AUTO SAFETY, THE CONSUMER FEDERATION OF AMERICA, AND THE MASSACHUSETTS PUBLIC INTEREST RESEARCH GROUP IN SUPPORT OF PETITIONER

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MOTION OF PUBLIC CITIZEN, INC., ET AL., FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

This motion for leave to file a brief amicus curiae is filed on behalf of four national consumer advocacy organizations—Public Citizen, Inc., the Center for Auto Safety, the Consumer Federation of America, and the Massachusetts Public Interest Research Group ("MASSPIRG"). Although the real parties in interest in this case have consented to the filing of amicus briefs, respondent the Honorable John Speroni has not, necessitating the filing of the motion under Rule 37(b).

Since its founding in 1971, Public Citizen has advocated before Congress, administrative agencies, and the courts on a wide range of issues of concern to consumers. The Center for Auto Safety, founded in 1970, works to make automobiles safer, more fuel efficient, and more economical. The Consumer Federation of America is the nation's largest consumer advocacy organization representing over 240 state, local, and national consumer organizations and over 50 million American consumers, and is active before Congress, state legislatures, administrative agencies, and in the courts on matters of concern to consumers. Established in 1971, MASSPIRG is a consumer and environmental non-profit organization with 45,000 members across the Commonwealth of Massachusetts. MASSPIRG works on a wide range of consumer, government reform, and environmental matters.

Amici have an interest in this petition for two related reasons. First, they support the use of class action litigation because it provides individuals of modest means access to the civil justice system. The class action can be abused, however, when the class representatives and their lawyers are not attentive to the needs of the absent class members, as amici believe occurred in the present case. Amici, particularly Public Citizen, have worked in the courts to establish rules that provide stricter scrutiny of class actions and greater protections for absent class

members. *See* Henry J. Reske, *Two Wins for Class Action Objectors*, 82 A.B.A. Journal 36, 37 (June 1996) (highlighting Public Citizen's work representing absent class members).

Second, amici are concerned about the particular harms inflicted on the absent class members in this case. In our view, the decision below illustrates what can happen when the judiciary does not exercise proper control over the class certification process. Amici, especially the Center for Auto Safety and the Consumer Federation of America, have worked to open up the automotive parts market to competition from manufacturers other than the original equipment producers, which saves American consumers hundreds of millions of dollars and results in lower automobile insurance premiums. *See generally Design Innovation and Technology Act of 1991: Hearing Before the Subcommittee on Intellectual Property and Judicial Administration of Committee of the Judiciary, House of Representatives*, 102d Cong., 2d Sess. (1992). However, as explained in more detail in the brief that follows, the nationwide class certification approved by the trial court below will undermine this consumer-friendly goal of increased competition and is at odds with state laws that encourage the use of non-original equipment parts. Amicus MASSPIRG has a particular interest in this problem because Massachusetts is one of the states whose law actively promotes such competition. *See* Mass. Regs. Code tit. 211, § 133.04(1).

Finally, although amici agree fully with petitioner that the legal issues presented in the petition are worthy of review and that they were decided incorrectly by the courts below, we take a somewhat different position on how those issues might be resolved by this Court. In sum, this motion should be granted because amici's views provide a different perspective on the questions presented in the petition.

Respectfully submitted,

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August 19, 1998

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BRIEF AMICUS CURIAE OF PUBLIC CITIZEN, INC., ET AL.

INTEREST OF AMICI

Public Citizen was founded in 1971 as a public advocacy, lobbying, and litigation organization. On behalf of its 120,000 members, Public Citizen has worked toward the enactment of consumer protection laws, and believes strongly in the need for class actions to enforce effectively those laws because individuals acting alone often do not have the means to do so. Public Citizen recognizes, however, that class actions can be abused, to the detriment of consumers. Thus, through its Litigation Group, Public Citizen has represented objectors in approximately two dozen nationwide class action settlements in which, as in the present case, the named representatives and their attorneys were inattentive to the needs and divergent interests of the absent class members whom they were supposed to represent.[1] In Public Citizen's view, the petition presents an opportunity to resolve lower-court conflicts and strengthen the Court's evolving due process jurisprudence relating to class actions.

The Center for Auto Safety is a nationwide consumer organization with approximately 15,000 members that, for more

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[1] *See, e.g., Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231 (1997); *In re General Motors Corp. Pick-up Truck Fuel Tank Litig.*, 55 F.3d 768 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995); *Bowling v. Pfizer, Inc.*, 922 F. Supp. 1271 (S. D. Ohio), *on reconsideration*, 927 F. Supp. 1036 (S.D. Ohio), *aff'd*, 102 F.3d 777 (6th Cir. 1996); *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 1995 U.S. Dist. Lexis 3507 (E.D. La. Mar. 20, 1995); *see generally* Henry J. Reske, *Two Wins for Class Action Objectors*, 82 A.B.A. Journal 36, 37 (June 1996) (highlighting Public Citizen's work representing absent class members).

than 28 years, has worked to make automobiles safer and more economical. Of particular relevance here, since the 1980's, the Center has advocated before Congress and elsewhere to open up the automotive parts market to competition from manufacturers other than the original equipment producers. In the Center's view, competition brings down the price of such parts and, therefore, the cost of automobile insurance to consumers who pay for parts indirectly in the form of premiums.

The Consumer Federation of America ("CFA") is the nation's largest consumer advocacy organization, representing over 240 state, local, and national consumer organizations and over 50 million American consumers. It is active before Congress, state legislatures, administrative agencies, and in the courts on matters of concern to consumers. Over the years, CFA has expended considerable resources on educating consumers and influencing government policies on matters relating to automobile insurance. Of particular relevance to this case, CFA has testified before Congress in opposition to legislation that would give unwarranted monopoly power to makers of original equipment automotive parts.

The Massachusetts Public Interest Research Group ("MASSPIRG") is a consumer and environmental non-profit organization with 45,000 members across the Commonwealth of Massachusetts. MASSPIRG has represented the interests of its members and consumers generally since 1971 on a wide range of consumer, government reform, and environmental matters, including those involving automotive and product safety, ensuring that consumers have a wide choice of safe, competitively priced goods and services. MASSPIRG has a particular interest in the lawsuit before this Court because the suit places in jeopardy a consumer-friendly policy of the Commonwealth of Massachusetts intended to reduce the cost of automobile repairs. *See infra* 8 (discussing Mass. Regs. Code tit. 211, § 133.04).

INTRODUCTION

This case illustrates the ways in which abuse of the class action device—if left unchecked—can harm the interests of the very people it was designed to protect. The certification of a five million person multi-state class, and the inadequate notice to class members permitted by the trial court, threatens to harm the rights of absent class members by: (1) using Illinois law effectively to prevent other states from enforcing their own cost-saving, pro-consumer policies that a majority of class members may in fact support; (2) providing notice by publication only for the entire class when (if class counsel are correct) a significant number of class members have substantial damages claims; and (3) consolidating the liability claims of a multi-state class into one generic claim that ignores important differences in state law that would be of substantial benefit to some significant segment of the class.

Before explaining why this Court should grant review, amici address two points on which we part company with the petitioner. First, we do not agree with petitioner's hyperbolic introductory claim that "[m]ulti-state class actions in state court have become the equivalent of legalized extortion." Pet. 1. Nor do we endorse petitioner's overheated discussion of the supposed "epidemic proportion[s]" of state-court class action abuse. Pet. 24-28. Petitioner's views on this score are anecdotal, and in amici's experience, unfounded. It is our view that both state and federal class actions provide justice in the majority of cases. Moreover, the abuses that do occur—and they do—take place in both state and federal courts. *See, e.g., In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 807-09 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995); *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348 (7th Cir. 1996) (federal court refusal to entertain collateral attack on abusive state court settlement) (Easterbrook, J., joined

by Posner, Manion, Rovner, & Wood, JJ., dissenting from denial of en banc review), *cert. denied*, 117 S. Ct. 1569 (1997). The petition should be granted here, not because of the alleged crisis cited by petitioner, but because the legal issues raised by the petition are recurring and important and the Court's resolution of them will, we believe, help curb abuse in *both* state and federal courts.

Second, amici's principal concern here is not the alleged potential for class action "blackmail," *see* Pet. 28, which we believe is vastly overstated by petitioner. Rather, our concern is with certification of overbroad classes with inadequate notice, such as occurred here, which can affirmatively harm consumers. That harm is inflicted here, as we explain in more detail below, because certification of a multi-state class may sweep aside the rights of consumers in states other than the forum state if the lower court's erroneous application of forum law to a nationwide class is permitted to stand. The kind of abuse that occurred here also injures consumers more generally by fueling the mistaken perception that consumer class actions are out of control. In short, if courts—both state and federal—do not take steps to control class action abuse by establishing proper parameters for certification and notice, legislatures may go too far in the other direction, undermining the class action device and its potential to bring justice to individuals who might not otherwise have access to our civil justice system. With these background points in mind, we now turn to the relevant facts and legal issues.

STATEMENT AND SUMMARY

1. At the heart of this suit is petitioner State Farm's policy favoring the appropriate use of so-called non-original equipment manufacturer ("OEM") crash parts, rather than more expensive parts sold on new assembly-line vehicles. In general,

petitioner authorizes repairs to vehicles covered under its automobile insurance policies using non-OEM parts where those parts can restore the vehicle to its "pre-loss condition" or are of "like kind and quality" as the original part. Class counsel claims that this policy has imposed monetary damages on *all* State Farm policy-holders whose vehicles have been repaired with non-OEM crash parts.

Contrary to class counsel's assertions, consumers benefit both directly and indirectly from policies that encourage the use of non-OEM replacement parts, which is why national consumer groups, such as amici, have long supported such policies. This benefit to consumers occurs not only because non-OEM parts are less expensive than OEM parts, but because their very existence as an alternative to OEM parts serves to stimulate competition and reduce the cost of OEM-parts. For car owners of the do-it-yourself variety, the downward trend that non-OEM parts has on the replacement parts market leads to substantial direct benefits. For car owners who prefer to leave this task to an auto body shop, the savings are apparent on the "parts" portion of the final bill. And of particular relevance here, the use of non-OEM parts benefits policy-holders in general, and the plaintiff class members in particular, by reducing the cost of repairs and thus insurance premiums.

Because crash parts account for nearly half the cost of accident claims, savings on those parts lead to significant reductions in the total cost of post-accident repairs. *Industrial Design Protection: Hearings Before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice of the Committee on the Judiciary, House of Representatives,* 101st Cong., 2d Sess. 282-91 (1990) (statement of Rodger Lawson, Senior Vice-President and economist for the American Alliance of Automobile Insurers). Non-OEM parts can be sold at reduced rates because their manufacturers do not bear the cost of research, development, advertising, or special packaging.

The presence of non-OEM parts as an alternative to OEM parts stimulates competition in the replacement parts market and has forced automobile manufacturers like General Motors to cut the prices of their OEM parts in an attempt to remain competitive. *Design Innovation and Technology Act of 1991: Hearing Before the Subcommittee on Intellectual Property and Judicial Administration of Committee of the Judiciary, House of Representatives*, 102d Cong., 2d Sess. 122-23 (1992) (statement of Mark Silbergeld, Director, Washington Office of Consumers Union); *see also* Claude E. Barfield and Cynthia A. Beltz, *Industrial Design Protection and Automobile Repair Parts: Balancing Competition and Monopoly at Home and Abroad* 49-69 (Feb. 23, 1990) (available through the American Enterprise Institute, Washington, D.C.).

Although some OEM and non-OEM parts are not of high quality, there is no reason to believe that non-OEM parts are generally inferior. The non-OEM crash parts that are the subject of this litigation are held to stringent standards of independent parts-testing agencies that ensure the same quality as their OEM counterparts. Only non-OEM parts certified by the Certified Automotive Parts Association ("CAPA") are used to repair the automobiles that petitioner insures. CAPA conducts "a rigorous testing program" for crash parts under the guidance of an independent testing laboratory. *Design Innovation and Technology Act of 1991: Hearing Before the Subcommittee on Intellectual Property and Judicial Administration of Committee of the Judiciary, House of Representatives*, 102d Cong., 2d Sess. 116 (statement of Clarence Ditlow, Executive Director of the Center for Auto Safety). The CAPA program includes the following:

> [I]nitial on-site inspections of manufacturing plants, review and approval of quality control manuals, periodic re-inspections, demanding

> tests of each part for which certification is desired . . . . The actual part testing procedures include dimensional checks (form and fit), metallurgical analysis (composition, mechanical properties, thickness), corrosion protection and construction requirements.

Id. 116-17.

In sum, for automobile insurance companies that insure millions of drivers, the cost-savings made through the use of non-OEM parts runs into the hundreds of millions of dollars. *Id.* at 112. These savings are often passed on to policy-holders in the form of reduced insurance premiums on collision coverage or lower rates of increase on pre-existing collision coverage premiums. *Id.* at 306 (statement of David F. Snyder, American Insurance Association). Thus, consumers in general benefit from State Farm's policy of promoting the use of non-OEM parts. Since the class members benefit from the policy in question both as consumers and as State Farm policy-holders in particular, there is good reason to believe that, if properly informed, significant portions of the class would support rather than oppose the policy that is challenged in this litigation.

2. The pro-consumer orientation of petitioner's policy highlights the need for adequate notice in the class action context, and thus for the Court to review the decision below permitting publication-only notice to the five million member class here. The Fourteenth Amendment's due process clause requires that government provide certain procedural protections before disposing of the property interests of private individuals. *Mathews v. Eldridge*, 424 U.S. 319, 332-33 (1976). In this case, two sets of legal interests are at stake. First, class members have a right to "opt-out" of the class so that they may litigate their claims by themselves, independent of the class. *See*

Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812-13 (1985). Second, class members have a right to appear in court and oppose litigation brought on their behalf. In the present case, where petitioner's policy favoring the use of non-OEM parts benefits a large segment, if not all, of the plaintiff class, the need for adequate notice is crucial because it permits class members to "check" litigation that may affirmatively harm their interests.

Often times, personal notice is the only way to alert absent class members of litigation that has been brought on their behalf. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974). Yet the lower court permitted the class to be notified by publication only, even though the defendant has the names and addresses of a significant segment of the class. Moreover, fairness to the defendant requires that a class action judgment be binding on all class members, but, given the inadequate notice here, State Farm might not be able to obtain the desired *res judicata* effect over class members who did not receive notice even though their names and addresses were readily ascertainable. *See Shutts*, 472 U.S. at 812; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 307, 314-15 (1949).

3. Review is also warranted regarding the propriety of the lower court's decision to apply Illinois law on a nationwide basis, which implicates the due process rights of both the absent class members and defendant State Farm. *Shutts*, 472 U.S. at 815-23. Even if class counsel are correct in their assertion that petitioner's policy violates the Illinois Consumer Fraud and Deceptive Practices Act, 815 Ill. Comp. Stat. 505/1, *et seq.*, other states do not agree with that view and have a substantial interest in applying their own laws. Both Massachusetts and Hawaii, for example, actively promote the use of non-OEM parts. *See* Mass. Regs. Code tit. 211, § 133.04(1) (non-OEM parts "shall be used" absent specific conditions); Haw. Rev.

Stat. Ann. § 431:10C-313.6(a) (insureds who insist on receiving OEM parts must pay the price differential between the OEM-part and a non-OEM part). In this case then, the extra-territorial application of Illinois law impedes the rights of other states to adopt and encourage cost-savings practices for their citizens. Moreover, even if law in other states were deemed *less* favorable to class members than Illinois law—and thus the choice-of-law decision below were said to *favor* the plaintiff class—defendant State Farm may have a right to avoid application of Illinois law with respect to insureds living in other states. *Shutts*, 472 U.S. at 822.

REASONS FOR GRANTING THE PETITION

A. THIS COURT SHOULD CLARIFY THE KIND OF NOTICE THAT THE DUE PROCESS CLAUSE REQUIRES FOR ABSENT CLASS MEMBERS.

The pro-consumer nature of petitioner's non-OEM policy highlights the need for notice to absent class members that is "reasonably calculated to reach interested parties." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 307, 318 (1949). Under *Mullane*, notice serves a dual purpose. First, and more traditionally, it seeks to inform interested parties of pending litigation that may deprive them of their legal claims to certain property. *Id.* at 313. Second, it seeks to increase the chance that unscrupulous counsel who wish to abuse the litigation process to the detriment of the class will be checked or "safeguard[ed]" by those who have been notified. *Id.* at 319. In this case, class counsel assert that, since current postal addresses are known for only part of the class, none of the class is entitled to personal notice. That logic escapes us. In our view, due process requires that, where the names and address of absent class members are known, personal notice by mail is the

constitutionally prescribed standard, at least where the property interest at stake for the individual class member is substantial.

The lack of proper notice is particularly troubling here, where a well-informed class might well register its opposition by intervening or opting out. Where a pro-consumer policy, such as the use of non-OEM parts, is at stake, inadequate notice may mean that class members end up worse-off as a result of the litigation. *Cf. Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2250-52 (1997). For instance, without intervention by this Court, given the lower court's insistence that Illinois law is applicable nationwide, this action could result in payment of damages and an injunction against petitioner's non-OEM parts program, leading to large increases in auto insurance premiums. Class members opposed to that result have a right either to opt-out of the class in an attempt to make their opposition to it known or object to it formally in an Illinois court. Without notification, they can do neither.

This Court has been highly skeptical of subjecting the rights of class members to the right-date, right-paper, right-page chance game that characterizes notice by publication. *See Mullane*, 339 U.S. at 315 (noting that publication notice subjects due process rights of stakeholder to chance, and that likelihood of seeing notice is small when notice does not list stakeholder by name); *see also Schroeder v. New York*, 371 U.S. 208 (1962). Only in cases where information regarding the whereabouts of the class member is not known has this Court found that "indirect" and "probably futile" notice is sufficient. *Mullane*, 339 U.S. at 317. Where such information is known, or is "easily ascertainable," *Schroeder*, 371 U.S. at 213, the Court has held that anything less than personal notice violates due process. *See also Mullane*, 339 U.S. at 318 ("Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its

pendency"). Thus, even if, as class counsel contends, the address lists for the class members may not be 100% accurate, the use of mail-forwarding, internet directories, and State Farm's own data-bases require the Illinois courts to insist on methods of notice calculated to reach many more class members than the publication notice sanctioned below.

The decision of the lower court authorizing publication notice to the whole class, on the ground that addresses could not be obtained for a sizable portion of the class, is difficult to square with *Mullane*, which presented strikingly similar facts. There, the Court was confronted with a group of known and unknown trust beneficiaries who had been notified solely by publication in accordance with a state statute. The Court recognized that the beneficiaries whose names and location were unknown could be bound by publication notice alone, but required more for the others:

> The statutory notice to known beneficiaries is inadequate not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand.

Mullane, 339 U.S. at 319.

Although *Mullane* was not technically a class action, it dealt with the rights of what the Court called a "class" of similarly situated beneficiaries. *Id.* at 319. Whether *Mullane*'s due process teachings apply to a state court class action was at issue in *Shutts*, where the Court permitted a Kansas state court to bind a nationwide class of absent plaintiffs seeking money damages because the class members included only those absent plaintiffs who had been notified by first-class mail as evidenced by a signed receipt, in accordance with the requirements of the

Kansas class action procedure. 472 U.S. at 811-13. Because the Kansas rule met due process requirements, *Shutts*, 472 U.S. at 812, the Court had no occasion to decide whether individual first-class mail notice is absolutely required under circumstances such as those presented here, although *Shutts*' admonition that "[t]he notice must be the best practicable," *id.* at 812, certainly suggested that it is.

Petitioner claims that the Court's decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974)—which held that first-class mail notice is required in all actions certified under Federal Rule of Civil Procedure 23(b)(3)—is dispositive here, because, in petitioner's view, *Eisen* relied on a due process rationale. We are less certain of *Eisen*'s direct application to all state court damages class actions, *see* 417 U.S. at 177, but any uncertainty on that question only emphasizes the need for review here.

Two further points not addressed by petitioner heighten the importance of the notice issue and the need for this Court to resolve it. First, petitioner appears to argue that first-class mail notice (and an opportunity to opt out) is constitutionally required at the class certification stage in all class actions where the "predominant" relief sought is money damages. Pet. 20-21 & n.11. We agree that those rights had to be accorded the class here, where, if the allegations in the complaint have merit, some class members may each have claims worth many thousands of dollars. However, in a case where the maximum value of the claim of a plaintiff class member is for less than, say, $100, we are not prepared to argue that, under all circumstances, due process requires that such a class member be given an opt-out right and first-class, rather than publication, notice at the certification stage, after balancing the value of such rights against the cost of preserving them. *See Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

Which brings us to our second point. The court below

assumed that the plaintiffs (and thus, in reality, their counsel) would have to bear the initial costs of notice. Although that is correct in a federal action under the text of Rule 23, *see Eisen*, 417 U.S. at 177-79, it is an open question whether state class action rules may, consistent with due process, require defendants to pay, or assist in reducing, those costs in certain circumstances. In our judgment, due process does not forbid a court that has found that the plaintiffs stand a reasonable likelihood of success on the merits from requiring the defendant to pay some or all of the notice costs, with those costs ultimately to be borne by the losing party. One factor in apportioning notice costs at the certification stage might well be the defendant's ability to reduce those costs by efficiently identifying and locating class members, or even including the notice in the company's regular mailings to its customers. *Cf. Mullane*, 319 U.S. at 318 (noting that first-class mail was practicable in light of trustee's periodic contacts with trust beneficiaries). Although amici doubt that such an option is appropriate here—given our skepticism on the merits of the class claims—the issue of whether due process requires individual notice, paid by the plaintiffs in every case, is fairly included in the question presented and cannot be avoided if the Court is to determine, as we believe it should, the notice issue presented here. *See Mathews*, 424 U.S. at 335 (setting forth due process balancing test).

B. THE DUE PROCESS ISSUES RAISED BY THE LOWER COURT'S NATIONWIDE APPLICATION OF ILLINOIS LAW ARE WORTHY OF REVIEW.

The application of Illinois law to the claims of out-of-state class members permits Illinois to undermine the decisions of sister states to promote the use of non-OEM parts. The Court

should grant review to clarify two related questions relating to multi-state class actions: First, does the due process clause permit the certification of a multi-state class through application solely of forum law in the face of conflicting state laws from other jurisdictions? Second, is the fact that petitioner's headquarters is located in Illinois enough to create sufficient "minimum contacts" between Illinois and out-of-state class members to permit the extraterritorial application of forum law? *See generally Shutts*, 472 U.S. at 815-23.

As noted above, Massachusetts and Hawaii promote the use of non-OEM parts by auto insurance companies. Thus, even if the trial court finds that petitioner's policy favoring non-OEM parts violates the Illinois Consumer Fraud Act and Illinois contract law, as class counsel allege, the court's judgment could not be binding, at the least, on class members who reside in those states. If it were, an Illinois state trial court would have effectively nullified the law of those states. Put another way, because of these stark conflicts in law among the states, due process prevents the application of one state's law to every member of this nationwide class. *See Shutts*, 472 U.S. at 821-22. To hold otherwise, in this case for instance, would allow a single judge or jury sitting in one county of one state to override Massachusetts' decision to promote the use of non-OEM parts to limit the cost of auto insurance.

Furthermore, the application of forum law to out-of-state plaintiffs is limited, in part, by "the expectation of the parties." *See Shutts*, 472 U.S. at 822. Since the law of Massachusetts affirmatively requires the use of non-OEM parts by auto insurers, it was reasonable for petitioner not to expect lawsuits of this kind with Massachusetts residents as plaintiffs. Under the lower court's decision, however, petitioner may be required to pay damages to policy-holders who reside in a state where the law generally mandates the use of non-OEM parts, thus raising significant due process concerns by creating

defendant liability that could be avoided only by violating Massachusetts law. *Cf.* Fed. R. Civ. P. 23 (b)(1)(A) and (b)(2). Moreover, policy-holders in states that permit or encourage the use of non-OEM parts had a right to rely on those laws (and the lower premiums that they bring), and thus they would have no reason to expect that another state's laws would be employed to nullify their own state's pro-consumer policies.[2]

Nevertheless, class counsel contends that across-the-board application of Illinois law to both in-state and out-of-state policy-holders is permissible because Illinois has a significant interest in regulating corporations that operate within its borders. Although the regulation of in-state corporations does provide Illinois some interest in the claims raised by the plaintiff class, that interest is outweighed, in amici's view, by the greater interest that other states have in regulating the corporations that conduct business with their residents. After all, it is the states in which the plaintiffs reside, and not where the corporation is headquartered, that generally must contend with the consequences of corporate misconduct and the costs of regulating that misconduct.

Most of the relevant "contacts" for a non-Illinois policy-

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[2] The enactments in Massachusetts and Hawaii favoring non-OEM parts present the clearest conflict with the class action here, since it invokes Illinois law to obtain a nationwide injunction against any use of non-OEM parts by petitioner. Second Amended Complaint, at 12-13. However, as petitioner points out, many other states permit the use of non-OEM parts in a wide variety of circumstances. *See* Pet. 12 & n.7. Applying the Illinois consumer protection law on a nationwide basis in the manner that class counsel seeks here would effectively override the law of many states and thus runs headlong into the due process principles enunciated in *Shutts*.

holder are in his or her home state. Take, for example, a typical Arizona policy-holder. Generally speaking, the policy-holder would have bought the policy in Arizona on terms approved by Arizona insurance regulators, through an agent based in Arizona, on a vehicle licensed and driven in Arizona. If the vehicle is involved in an accident, it is likely to take place in Arizona. If replacement parts are needed, the repairs will likely be performed in Arizona (and almost certainly will *not* be performed in Illinois). And, ultimately, if the policy-holder seeks to vindicate "rights" such as those asserted in the present lawsuit, one must then determine whether the replacement parts placed on the vehicle in Arizona restored the vehicle to its "pre-loss condition" or are of "like kind and quality" as the vehicle's original parts. In circumstances such as these, it is difficult to see why Illinois law would apply simply because the defendant is headquartered there. As petitioner points out, many courts share this view. *See* Pet. 15. On the other hand, there is some authority for the contrary proposition, *id.*; Pet. App. 10a-11a, and there may be some cases where the law of the defendant's home state might be properly applied to a nationwide class, such as when a defective product were made there. This confusion further demonstrates the need for review of the lower court's choice-of-law ruling.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,*

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* We gratefully acknowledge the significant contribution to this brief of Elizabeth Kim, a second-year student at Yale Law School.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

THE HONORABLE JOHN SPERONI, TAMMY SNIDER and MICHAEL AVERY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

BRIEF OF AMICUS CURIAE STATES OF NEVADA AND MASSACHUSETTS

AMICUS CURIAE BRIEF SUPPORTING PETITION FOR A WRIT OF CERTIORARI

(Filed in Support of State Farm Mutual Automobile Insurance Company)

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INTEREST OF THE AMICI

Nevada and Massachusetts object to the actions of the Illinois state court in applying Illinois law to class members' claims in Nevada, Massachusetts, and other states. The amici states support the position of Petitioner State Farm Mutual Automobile Insurance Company (State Farm) and urge this Court to grant certiorari to review the decision of the Illinois Supreme Court to deny State Farm's mandamus/prohibition/ supervision petition. Nevada, Massachusetts, and numerous other states have different laws than the state of Illinois with respect to the use of non original equipment manufacturer (OEM) parts, and indeed most states support the use of non-OEM parts in automobile repairs to keep the cost of those repairs down. To allow an Illinois state court to dictate what State Farm policyholders in other states will pay for automobile repairs is completely improper and offends the basic principle that each state must be free to determine its own policy and make its own laws with regard to the business of insurance.

SUMMARY OF ARGUMENT

The numerous cases of this Court and the federal circuit and district courts cited by State Farm in its petition for certiorari and the other amicus curiae demonstrate that the decision of the Illinois state court in applying Illinois' consumer fraud law to class members in other states with different laws is an incorrect decision and legally invalid. There is no need to extensively repeat the same cases and

argument that the counsel for the State Farm and the other amicus curiae have so ably cited and argued in their respective briefs. This brief will be limited to a discussion of state law and policy in order to demonstrate how much of a deleterious effect the decision of the Illinois state court will have on states with different laws on OEM parts than Illinois and the extent to which the actions of the Illinois state court contravene the carefully considered public policy of Nevada, Massachusetts, and other states as to the use of OEM parts.

The question for this Court is whether to grant certiorari to review a pretrial decision before the case has gone to trial. Nevada and Massachusetts strongly urge this Court to take this unusual step in this case because of the potentially far-reaching and extraterritorial effect of a verdict or settlement in the Illinois case. Because of the pressure to settle class action suits after verdict or under threat of one, it is unlikely that this Court will review the action of the Illinois state court unless it does so at this time. If State Farm settles, the burden on the State Farm policyholders in other states with different laws as to the use of OEM parts will become a reality. These policyholders in other states, including Nevada and Massachusetts that allow the use of non-OEM parts, may face increased premiums for insurance. Other insurance companies will have an unfair advantage over State Farm. States whose laws allow the use of non-OEM parts to keep insurance costs down will see the intent of those laws thwarted.

ARGUMENT

THE ACTIONS OF THE ILLINOIS STATE COURT IN APPLYING ILLINOIS LAW TO CLAIMS OF CLASS MEMBERS IN OTHER STATES IMPINGES ON THE RIGHTS OF OTHER STATES AND WILL UNFAIRLY BURDEN STATE FARM POLICY-HOLDERS IN THOSE STATES.

This Court has in several recent cases upheld the principle that each state has the right to determine and enforce its own public policies within its own borders but may not attempt to affect commerce or public policy in other states. *See*, *BMW v. Gore*, 517 U.S. 599 (1996); *Healy v. Beer Institute*, 491 U.S. 324, 335-336 (1989); *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 582-583 (1986). Nevada, Massachusetts, and numerous other states have their own carefully considered policies on the use of non-OEM parts in automobile repairs. Because State Farm is typically the largest or one of the largest insurers of automobiles in any given state, any class action verdict or settlement that forces State Farm to use only OEM parts in a given state, in contravention of that state's explicit policy to allow the use of such parts, can only have a detrimental effect on insurance premium rates in that state.

In Nevada, State Farm is the number one insurer of motor vehicles and insures 207,600 vehicles, 15.2 percent of the total number of vehicles insured. Nevada already

has the ninth highest automobile insurance premiums in the nation. A settlement in the Illinois case that forces State Farm to have to use only the more expensive OEM parts in Nevada, even though non-OEM parts are specifically authorized after disclosure under Nevada Administrative Code (NAC) section 686A.240, would unnecessarily drive up the cost of insurance premiums for the Nevada State Farm policyholders as a whole.

NAC section 686A.240 is a regulation that was added to the Nevada Administrative Code in 1992 by the Commissioner of Insurance and the Department of Motor Vehicles and Safety pursuant to the Nevada Administrative Procedure Act, Chapter 233B of the Nevada Revised Statutes (NRS). A Nevada state agency must provide public notice of a proposed regulation and a public hearing prior to a regulation being enacted. NRS 233B.061. This regulation must then be submitted to a legislative commission to determine whether it conforms to statutory authority and carries out legislative intent. NRS 233B.067.

In Massachusetts, the Code of Massachusetts Regulations title 211, § 133.04, states that when a part in a damaged vehicle must be replaced, except in specific limited circumstances, "a rebuilt, aftermarket [non-OEM] or used part of like kind and quality, at the lowest possible price, shall be used in the appraisal. . . ."

In the present case, if the decision of the Illinois Supreme Court in denying the petition for mandamus/ prohibition/supervision is not reviewed by this Court, the clear intent of NAC 686B.240 in permitting the use of non-OEM parts and the intent of MASS. REGS. CODE tit. 211, § 133.04 in requiring the use of non-OEM parts will be thwarted as to a large percentage of Nevada and Massachusetts motorists, in this instance the State Farm policyholders. This Court should not permit an Illinois state court, over which the residents of Nevada and Massachusetts have no authority, to determine what policyholders must pay for automobile body parts in the amici states.

Nevada and Massachusetts' policies and regulations concerning the use of non-OEM parts were carefully considered and enacted pursuant to the procedural laws of these states, with the intent to best serve their consumers. In enacting legislation or regulations dealing with non-OEM parts, each state must weigh the importance of reliable repair parts against the need to keep automobile insurance premiums low. The decision of the Illinois state court to force State Farm to treat every State Farm policyholder the same in 48 states does a great disservice to the independence of the several states to determine their own policies in this area.

The McCarran-Ferguson Act (15 U.S.C. 1011 et seq.) leaves the regulation of the business of insurance to the states rather than one state or to the federal Congress.

The Act rejects the concept of nationwide regulation of insurance practices.

CONCLUSION

For all the foregoing reasons, this Court should grant certiorari to review the decision of the Illinois Supreme Court to deny the petition for mandamus/ prohibition/supervision.

Respectfully submitted,

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No. 97-2063

In The

Supreme Court of the United States

October Term, 1997

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

vs.

THE HONORABLE JOHN SPERONI, TAMMY SNIDER AND MICHAEL AVERY,

Respondents.

On Petition For A Writ Of Certiorari To The Illinois Supreme Court

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF NATIONAL CONFERENCE OF INSURANCE LEGISLATORS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

(Filed In Support Of State Farm Mutual Automobile Insurance Company)

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The National Conference of Insurance Legislators ("NCOIL") hereby moves for leave to file the attached brief *amicus curiae* in support of a petition by State Farm Mutual Automobile Insurance Company ("State Farm") for a writ of certiorari. NCOIL has obtained State Farm's consent to the brief's filing, but one of the respondents, the Honorable John Speroni, has informed the parties that he will neither grant nor withhold consent to the filing of any briefs *amici curiae*.

NCOIL is an association of state legislators whose purpose is to advance the ability of each state legislature to regulate insurance business practices. The interest of NCOIL in this case arises from NCOIL's desire to preserve the traditional primacy of state insurance regulation through judicial affirmation that no state may regulate insurance practices beyond its own borders.

In the petition for a writ of certiorari, State Farm challenges *inter alia* the constitutionality of an attempt, through certification of a nationwide class-action lawsuit, to apply Illinois state law to insurance business practices in 47 other states. In the attached brief *amicus curiae*, NCOIL submits that such extraterritorial regulation is not only unconstitutional, it also violates the McCarran-Ferguson Act, in which Congress established the primacy of state insurance regulation by delegating to each state the power to regulate insurance business practices within its borders.

As lawmakers to whom Congress has delegated regulatory power, the members of NCOIL bring to this case a

different perspective than that of State Farm and are well-positioned to provide supplemental briefing on the McCarran-Ferguson issue, which is introduced in the petition for a writ of certiorari.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF NATIONAL CONFERENCE OF INSURANCE LEGISLATORS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

The National Conference of Insurance Legislators ("NCOIL") submits this brief *amicus curiae* in support of a petition for a writ of certiorari by State Farm Mutual Automobile Insurance Company ("State Farm") on the issue whether a state may, through certification of a nationwide class action, regulate insurance business practices beyond its own borders. This brief is accompanied by a motion for leave to file it, for lack of consent by one of the parties.[1]

State Farm challenges the certification of a nationwide class action in Illinois state court. The plaintiffs allege that State Farm's practice of sometimes specifying the use of automobile parts manufactured by sources other than the original equipment manufacturer ("non-OEM parts") when adjusting damage claims constitutes a breach of contract and a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act. The Illinois court has certified a class of some five million State Farm policyholders residing in 48 states.

NCOIL submits that the McCarran-Ferguson Act, as interpreted in *Federal Trade Commission v. Travelers Health*

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[1] No counsel for any party authored this brief in whole or in part. No person or entity other than the *amicus curiae*, its members or its counsel made a monetary contribution to the preparation or submission of the brief.

Association, 362 U.S. 293 (1960) ("*Travelers Health*"), precludes Illinois from regulating insurance practices extraterritorially through the device of nationwide class certification, and that such regulation is not only prohibited by Congress, it is unconstitutional. The McCarran-Ferguson Act establishes the primacy of state insurance regulation, delegating to each state regulatory power over insurance business practices. National policy favors *severalty*, not forced uniformity, in state regulation of the insurance industry. The nationwide class certification in this case contravenes *Travelers Health*, for it threatens such severalty by skewing the primacy of state insurance regulation in favor of a single state, and even makes it impossible for a national insurer to comply with the law of one state without violating the law of another.

The number of nationwide insurance providers is increasing and will continue to do so in the near future. National banks are now authorized to sell insurance, and a bill pending in Congress – which expressly reaffirms the efficacy of the McCarran-Ferguson Act – would substantially regulate such sales. The time is ripe for this Court to clarify the Congressional and constitutional limits on the territorial reach of state insurance regulation and bring nationwide class actions in line with *Travelers Health*.

THE INTEREST OF *AMICUS CURIAE*

Amicus curiae NCOIL is an association of state legislators who have joined together to advance the ability of

each state legislature to regulate insurance business practices. One of NCOIL's purposes, as set forth in its Articles of Organization, is to "reaffirm the traditional primacy of the States in the regulation of insurance." In NCOIL's view, the rule of individual state primacy will be impaired if, through certification of a nationwide class-action lawsuit against an insurance provider, a state can regulate insurance practices beyond its own borders. NCOIL's interest arises from its desire to preserve state primacy through judicial affirmation that no state may regulate insurance practices extraterritorially.

ARGUMENT

I.

THE NATIONWIDE CLASS CERTIFICATION CONTRAVENES THIS COURT'S INTERPRETATION OF THE McCARRAN-FERGUSON ACT AS PRECLUDING A STATE FROM REGULATING INSURANCE PRACTICES BEYOND ITS BORDERS.

A. The McCarran-Ferguson Act Delegates To "The Several States" The Power To Regulate Insurance Practices.

Congress enacted the McCarran-Ferguson Act (15 U.S.C. § 1011 et seq.) in 1945, in the wake of a ruling by this Court that Congress has the power to regulate interstate insurance practices. See *United States Dep't of the Treasury v. Fabe*, 508 U.S. 491, 499-500 (1993); *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). The Act delegates to each state regulatory power over insurance business practices, pursuant to a declaration of

Congressional policy that "continued regulation and taxation by the several States of the business of insurance is in the public interest. . . . " 15 U.S.C. § 1011. The heart of the Act is 15 U.S.C. § 1012(a), which provides, "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."

The McCarran-Ferguson Act also provides that the Sherman Act, the Clayton Act and the Federal Trade Commission Act "shall be applicable to the business of insurance to the extent that such business is not regulated by State law." 15 U.S.C. § 1012(b). Thus, the federal antitrust and trade laws will apply to insurance practices that the states do not or cannot regulate.

B. No State May Regulate Insurance Practices Beyond Its Own Borders.

In *Travelers Health*, 362 U.S. 293, this Court held that the McCarran-Ferguson Act permitted the Federal Trade Commission ("FTC") to regulate interstate mail order sales of health insurance from the Omaha office of a Nebraska corporation – despite a Nebraska statute purporting to prohibit unfair or deceptive insurance practices in Nebraska or "in any other state" – because the Act did not allow Nebraska to regulate *extraterritorially*. The Court said that, from the legislative history of the Act, "it is clear that Congress viewed state regulation of insurance solely in terms of regulation by the law of the State where occurred the activity sought to be regulated. There was no indication of any thought that a State could regulate activities carried on beyond its own borders."

Travelers Health, 362 U.S. at 300. The Court explained that no single state could assume primacy over any other state in insurance regulation:

> One of the major arguments advanced by the proponents of leaving regulation to the States was that the States were in close proximity to the people affected by the insurance business and, therefore, were in a better position to regulate that business than the Federal Government. . . . Such a purpose would hardly be served by delegating to any one State sole legislative and administrative control of the practices of an insurance business affecting the residents of every other State in the Union.

Travelers Health, 362 U.S. at 302 (citations omitted).

The Court in *Travelers Health* based its decision solely on interpretation of the McCarran-Ferguson Act, declining to consider the constitutional questions presented by a state's attempt to regulate insurance practices beyond its borders. The Court made clear, however, that there are substantial constitutional as well as Congressional obstacles to extraterritorial regulation: "Suffice it to note that the impediments, contingencies, and doubts which constitutional limitations might create as to Nebraska's power to regulate any given aspect of extraterritorial activity serve only to confirm the reading we have given to [§ 1012(b)] of the Act." *Travelers Health*, 362 U.S. at 302.

Since *Travelers Health*, lower federal courts have consistently held that the McCarran-Ferguson Act precludes extraterritorial state regulation of insurance practices. For example, in *In re Insurance Antitrust Litigation*, 938 F.2d 919, 928 (9th Cir. 1991) *aff'd in part and rev'd in part sub*

nom. Hartford Fire Insurance Co. v. California, 509 U.S. 921 (1993), the court said "established law blocks regulation by one state of the United States of the insurance business outside the borders of that state." In *Hamilton Life Ins. Co. v. Republic Nat. Life Ins. Co.*, 291 F. Supp. 225, 232 (S.D.N.Y. 1968), *aff'd*, 408 F.2d 606 (2d Cir. 1969), the court relied on *Travelers Health* to conclude that "[t]he legislative history of [§ 1012(b)] strongly substantiates the proposition that a State is not empowered to regulate interstate insurance practices which have their situs outside its borders." Accord, *Page v. Liberty Mutual Fire Ins. Co.*, 869 F. Supp. 596, 599 (N.D. Ill. 1994); *American Gen. Ins. Co. v. Fed. Trade Comm'n*, 359 F. Supp. 887, 895 (S.D. Tex. 1973); *United States v. Chicago Title & Trust Co.*, 242 F. Supp. 56, 60 (N.D. Ill. 1965); *In re Aviation Insurance Industry*, 183 F. Supp. 374, 380 (S.D.N.Y. 1960).

In *Seasongood v. K & K Ins. Agency*, 548 F.2d 729, 738 (8th Cir. 1977), where a Missouri insurance agent sued an entity with affiliates in many states including Missouri, the court said that *Travelers Health* "specifically cautions against giving preemptive effect" to extraterritorial state regulation, and thus precluded the court from giving "nationwide preemptive effect to Missouri law." *Seasongood* concluded: "Just as Travelers' presence in Nebraska did not warrant nationwide deference to the laws of Nebraska, defendants' presence in Missouri does not warrant nationwide deference to the laws of Missouri." *Seasongood*, 548 F.2d at 739 (footnote omitted).

Likewise, State Farm's presence in Illinois (as well as every other state) does not warrant nationwide deference to Illinois law regulating an insurer's specification of non-OEM parts. Yet nationwide class certification has

precisely such extraterritorial effect, for it makes transactions between State Farm and policyholders outside Illinois subject to the Illinois Consumer Fraud and Deceptive Business Practices Act.

The McCarran-Ferguson Act delegates regulatory power equally to "the *several* States" (15 U.S.C. § 1011 (emphasis added)) – not to one state above all others. Congress has declared the primacy of a State's regulation of insurance practices, *but only within that state's borders.* The notion that a single state can assume such primacy over all *other* states, through the device of certifying a nationwide class action, undermines this country's federal composition of "one nation as to foreign concerns" but "distinct in domestic ones." Jefferson, *Letter to James Madison, Dec. 16, 1786,* in The Life And Selected Writings Of Thomas Jefferson (Koch & Peden ed. 1993) at 377.

Travelers Health did not hold *directly* that the states may not regulate insurance practices extraterritorially. The holding was that the McCarran-Ferguson Act permitted FTC regulation in that case because the Act was not intended to permit extraterritorial state insurance regulation, and thus FTC regulation was permitted because the insurer's activity outside Nebraska was "not regulated by State law." 15 U.S.C. § 1012(b); see *Travelers Health,* 362 U.S. at 295, 301-302. But the *Travelers Health* opinion was only one step short of its interpretation by the lower federal courts that the Act affirmatively precludes extraterritorial regulation, as well as the conclusion that such regulation is unconstitutional (violating the Commerce Clause and the Full Faith And Credit Clause). The time has come for this Court to take that final step in a case where these issues are squarely presented.

C. Congressional Policy Favors Severalty In State Regulation Of Insurance Practices.

When enacting the McCarran-Ferguson Act, "Congress must have had full knowledge of the nation-wide existence of state systems of [insurance] regulation and taxation; of the fact that they *differ greatly* in the scope and character of the regulations imposed and of the taxes exacted. . . . " *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 430 (1946) (emphasis added). Congress meant to *preserve* this severalty – leaving each state free to go its own way in regulating the insurance industry – because forced uniformity of insurance regulation is *not* in the public interest.

The present case exemplifies such severalty in state insurance regulation. Thirty-six states have taken seven different approaches to insurer specification of non-OEM parts. One state, Massachusetts, requires use of non-OEM parts. Another state, Hawaii, strongly encourages such use by requiring policyholders to pay the price differential if they insist on receiving OEM parts. Twenty-five states permit use of non-OEM parts upon disclosure to the policyholder. Three states permit use without disclosure. Two states permit use with the policyholder's consent. Three states require consent during a limited time period. One state requires consent for certain types of non-OEM parts. There are even sub-catagories of different treatment within these seven categories. See State Farm's Petition For A Writ Of Certiorari at 12 n.7.

Class-action certification threatens State Farm with extraterritorial regulation by Illinois, presenting State Farm with an unsolvable dilemma. If State Farm is

required to specify the use of non-OEM parts in Massachusetts but in doing so can be held liable for violating Illinois law, State Farm can do no right in Massachusetts. State Farm will violate Illinois law by specifying non-OEM parts, yet will violate Massachusetts law by not doing so. This is precisely the sort of conundrum that the rule against extraterritorial regulation is intended to prevent.

The McCarran-Ferguson Act permits the states to indulge, not inhibit, the different approaches to regulation exemplified here. The nationwide class certification order threatens such severalty by skewing the primacy of state insurance regulation in favor of a single state, Illinois, above all others.

II.

THE NEED FOR SUPREME COURT REVIEW LOOMS LARGER AS THE NUMBER OF NATIONWIDE INSURANCE PROVIDERS CONTINUES TO INCREASE.

Now more than ever before, insurance is commonly sold by multi-state companies. This trend will continue. In 1996, this Court held that the states may not prohibit *national banks* from selling insurance. *Barnett Bank v. Nelson*, 517 U.S. 25 (1996) (federal preemption of state statute prohibiting national banks from selling insurance in a small town). Subsequently, the office of the Comptroller of the Currency issued an advisory letter providing guidance to national banks on insurance sales. Office of the Comptroller of the Currency, Advisory Letter 96-8 (Oct. 8, 1996). A bill now before Congress, the Financial Services Act of 1998, would substantially regulate such

sales. H.R. 10, 105 Cong. § 304 et seq. (1998). The bill would also express Congressional intent that the McCarran-Ferguson Act "remains the law of the United States." H.R. 10, 105 Cong. § 301 (1998).[2]

With the proliferation of multi-state insurance providers, with national banks joining their ranks, and with the McCarran-Ferguson Act once again at the fore of the national agenda, the time is ripe for this Court to give its imprimatur to Congress's 53-year-old policy against extraterritorial state regulation of insurance practices – and, if necessary, to decide the constitutionality of such regulation.

These issues will elude the Court unless certiorari is granted interlocutorily at the class-certification stage. Without immediate Supreme Court review, State Farm will be under "intense pressure to settle" (*Matter of Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995)) in order to avoid a potentially devastating judgment. That is commonly the fate – indeed, the goal – of high-stakes nationwide class-action lawsuits. The name of the game is "blackmail" (*id.* at 1298), and it works – though, unfortunately, often more to the benefit of class counsel (who can reap millions in fees) than to their clients (who might get little more than scrip for a future purchase). For this Court to review the issue whether a state may regulate insurance practices extraterritorially, through nationwide class-action certification, it's a matter of "now or never."

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[2] H.R. 10 was passed by the House of Representatives on May 13, 1998, and the next day was referred to the Senate Committee on Banking, where it is currently pending.

CONCLUSION

As urged in State Farm's petition for a writ of certiorari, the Court should grant the petition and summarily reverse the judgment below or, in the alternative, order plenary briefing and argument.

Respectfully submitted,

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No. 97-2063

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,
Petitioner,

v.

THE HONORABLE JOHN SPERONI,
TAMMY SNIDER, AND MICHAEL AVERY,
Respondents.

On Petition for a Writ of Certiorari to the Illinois Supreme Court

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AND AMERICAN LEGISLATIVE EXCHANGE COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Date: August 21, 1998

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On Petition for a Writ of Certiorari to the Illinois Supreme Court

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MOTION FOR LEAVE TO FILE BRIEF OF WASHINGTON LEGAL FOUNDATION, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation, *et al.*, respectfully move for leave to file the attached brief as *amici curiae* in support of Petitioner. Petitioner has consented to the filing of this brief, as have counsel for Respondents Snider and Avery. Their letters of consent have been lodged with the Clerk of the Court. Respondent Speroni, the trial judge to whom Petitioner wishes a writ of mandamus to be directed, has indicated that he takes no position on the filing of *amicus curiae* briefs. In the absence of his written consent, this motion is required.

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters nationwide, including many in Illinois. While WLF engages in litigation and participates in administrative proceedings in a variety of areas, WLF devotes a substantial portion of its resources to advancing the interests of the free-enterprise system and to ensuring that economic development is not impeded by excessive litigation. To that end, WLF has appeared before this Court as well as other federal and state courts in cases touching upon the proper scope of class action litigation. *See, e.g., Matsushita Electric Industrial Co. v. Epstein*, 116 S. Ct. 873 (1996); *Diamond Multimedia Systems v. Superior Ct.*, No. S058723 (decision pending, Calif. Sup. Ct.).

The American Legislative Exchange Council (ALEC) is the nation's largest individual membership association of state legislators, with some 3,000 legislative members, hailing from all fifty states. ALEC is a nonprofit 501(c)(3) organization, whose membership is comprised of bipartisan legislators.

Amici are concerned by the proliferation of class action lawsuits being filed in state courts and the inhibiting effect that such suits can have on the development and expansion of businesses. *Amici* believe that the class-certification decisions of the Illinois courts in this case, if allowed to stand, will exacerbate that trend by encouraging efforts to certify inappropriate nationwide classes that render the underlying lawsuits essentially untriable.

Amici are filing this brief because of their interest in promoting the welfare of the business community and the public at large; they have no direct interest in the outcome of this lawsuit or of any other suits raising similar issues.

Because of their lack of direct economic interests, *amici* believe that they can assist the Court by providing a perspective that is distinct from that of any party.

For the foregoing reasons, WLF, *et al.*, respectfully request that they be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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Date: August 21, 1998

QUESTIONS PRESENTED

1. Whether a court may constitutionally apply the law of the defendant's domicile to claims arising out of transactions that occurred entirely in other States, many of which have statutes or regulations specifically governing those transactions.

2. Whether it is consistent with due process requirements for a state court, in order to make class action treatment manageable, to relieve the class of its burden of proving the fact-specific claims of individual class members and to deprive the defendant of the opportunity to put on individualized proof to refute those claims.

3. Whether, in a class action seeking predominantly monetary relief, a state court's refusal to require that actual notice be provided to those members of the class whose names and addresses can be identified from Petitioner's records violates the Due Process Clause of the Fourteenth Amendment.

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On Petition for a Writ of Certiorari to the Illinois Supreme Court

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BRIEF OF WASHINGTON LEGAL FOUNDATION, *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF *AMICI CURIAE*

The interests of the *amici curiae* are set forth in the motion accompanying this brief.[1]

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* hereby incorporate the Statement contained in the Petition for a Writ of Certiorari.

In brief, Respondents' suit challenges a long-standing business practice of Petitioner State Farm Mutual Automobile Insurance Co. ("State Farm"), whereby State Farm provides in most of its insurance policies that it may specify use of parts manufactured by sources other than the original equipment manufacturer ("non-OEM parts") when adjusting claims for damage to insured vehicles. State Farm asserts that by retaining the option to specify non-OEM parts, it encourages competition in the automobile repair parts industry and thereby reduces costs to consumers.

Respondents assert that use of non-OEM parts violates a term of State Farm's standard form insurance policies used nationwide, whereby State Farm agrees to restore a policyholder's vehicle to "its pre-loss condition" after an accident, or to "pay to repair or replace the property or part with like kind and quality." Petition Appendix ("Pet. App.") 3a. Even though many States (including Illinois) expressly authorize the use of non-OEM parts and many consumer groups support the practice, Respondents assert that all non-OEM crash parts are inferior to OEM parts, and, as a result, they may never be used to restore a vehicle to its pre-loss condition.[2] Respondents also assert

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[2] After filing suit, Respondents subsequently made clear (and the trial court accepted) that their objection did not cover *all* parts but was limited to specification of non-OEM "crash parts" (i.e., vehicle components that are typically repaired or replaced as a result of crash

that State Farm's use of non-OEM parts violates the Illinois Consumer Fraud and Deceptive Business Practices Act (the "Illinois CFA"), 815 Ill. Comp. Stat. §§ 505/1 *et seq.* Pet. App. 2a.

In July 1997, Respondents Snider and Avery filed their putative class action in Illinois Circuit Court in Williamson County, Illinois on behalf of themselves and all others similarly situated. They sought certification of a plaintiff class consisting of all State Farm policyholders in 48 states who made a claim for vehicle repairs and were provided non-OEM parts (or the monetary equivalent) -- a class consisting of about 5 million people, even after the class was pared down to exclude non-crash parts. Pet. App. at 2a-3a. State Farm opposed certification on the grounds that the proposed class failed to satisfy the requirements of the Illinois class action statute and that certification of a nationwide class would violate State Farm's due process rights. The trial judge, Respondent Speroni, nonetheless certified the class as requested. *Id.* at 2a-17a. The judge found that there was no constitutional impediment to application of Illinois law to all class members (*id.* at 10a-11a), and that the issue of State Farm's liability could be determined on a class-wide basis -- because, the judge determined, evidence of differing circumstances among class members would be relevant only to the issue of damages, not to liability. *Id.* at 15a.

The trial court subsequently determined that Respondents could dispense with individual notice to class members. *Id.* at 21a-32a. Rather, the court approved a

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damage rather than as a result of normal vehicle usage). Pet. App. 18a-20a.

notice plan that involved publication of notice in a variety of newspapers and magazines, supplemented with a public relations campaign and promotion on the Internet. *Id.* at 23a, 28a. Although recognizing that State Farm was prepared to provide the Respondents with the names and addresses of 1.8 million class members, the court rejected notice by direct mail on the ground that direct mail would cost too much and would end up alerting fewer class members than the media plan proposed by Respondents. *Id.* at 27a-28a. The court rejected State Farm's argument that due process required notification by mail, finding that such notification is not constitutionally required when other forms of notification are equally effective. *Id.* at 29a.

State Farm then sought a writ of mandamus and/or prohibition or, in the alternative, a supervisory order from the Illinois Supreme Court, challenging both the trial court's certification order and the order dispensing with individual notice. That petition was denied without comment. *Id.* at 1a. State Farm seeks review in this Court of the Illinois Supreme Court's judgment.

SUMMARY OF ARGUMENT

Amici concur with State Farm's analysis of each of the three constitutional issues set forth as Questions Presented in the Petition. *Amici* are focusing this brief on the third of those three issues -- whether the trial court's refusal to require that notice of the suit be mailed to identifiable members of the class violates the Due Process Clause of the Fourteenth Amendment.

Even in the absence of the first two issues, the trial judge's certification and notice orders would merit this Court's review. In a long line of cases, the Court has

insisted that those entitled under the Due Process Clause to notice of legal proceedings must be provided with direct notice, either in the form of personal service or notice by mail. Nonetheless, as the number of very large class actions in state and federal courts has grown in recent years, trial courts have been increasingly willing (as was the court below) to forgo direct notice on the theory that other forms of notice (such as notice by publication) are at least as cost effective. Review by the Court is warranted in order to determine whether trial courts have acted properly in their abandonment of the direct notice requirement.

Moreover, review of the notice issue should not await entry of a final judgment in the underlying class action dispute. There is considerable evidence that once a class action has been certified, defendants have little choice but to enter into a settlement, regardless of the merits of the plaintiffs' claims. Moreover, even if a defendant decides not to settle, it may never have an opportunity to appeal an improper trial-court decision to waive notice by mail. If the defendant prevails at trial, it would have no adverse judgment from which to appeal. Yet, the defendant would have no protection from subsequent suits by absent class members, who could argue convincingly that they are not bound by a judgment in a proceeding of which they were provided no direct notice.

In sum, unless State Farm is permitted review of the trial court's notice order at this stage of the proceedings, it effectively will be denied any opportunity to obtain review of the order.

REASONS FOR GRANTING THE PETITION

I. THE COURT'S SUPERVISION IS REQUIRED TO REIN IN ABUSIVE CLASS ACTIONS

As the Petition well documents, abuse of the class action process is becoming an increasingly frequent occurrence.

A class action is a device intended solely to improve the efficiency of adjudication. As the Court recently explained:

> "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for an individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor."

Amchem Products, Inc. v. Windsor, 117 S. Ct. 2231, 2246 (1997) (quoting *Mace v. Van Ru Credit Corp.,* 109 F.3d 338, 344 (1997)).

Thus, class actions are intended to serve the interests of clients in obtaining compensation for injuries suffered. But as cases such as this one well illustrate, the interests of clients have very little to do with the management of many recent class actions. Rather, class actions are used by the plaintiffs' bar as a mechanism for ensuring that rights of individual claimants are never actually litigated at trial; by creating classes sufficiently large and unwieldy, class counsel can ensure that deep-pocketed defendants are forced to enter into settlements that handsomely reward the

class counsel but often provide little if anything of value to class members.

The Petition has well documented this phenomenon of what have rightly been described as "abusive" class actions, and *amici* will not belabor the point. Suffice to say that it is not merely corporate interests who are calling on the courts to enforce strict due process limits on the use of the class action mechanism to enrich a small group of lawyers. For example, former United States Attorney General Richard Thornburgh recently testified before Congress that class action attorneys "have found ways to pervert the class-action device and other aggregation tools, transforming them into their personal litigation lottery." Statement of Richard Thornburgh before the Courts and Intellectual Property Subcommittee of the House Committee on the Judiciary (March 5, 1998), available at 1998 WL 122533. "Such suits," General Thornburgh testified, "are obviously not meant to redress real injuries, but to target prosperous and vulnerable defendants." *Id.*

Such suits would not be a large problem if trial judges enforced existing restraints on the use of class actions. Plaintiffs' attorneys, however, have discovered trial judges who are willing to certify virtually any proposed class presented to them. By returning repeatedly to these same judges -- often located in remote rural areas with little connection to the subject matter of the case -- attorneys have been able to obtain certification for increasing numbers of class actions that could not get certified in most federal courts and that are virtually never brought to trial. *See* Stateside Associates, *Class Action Lawsuits in State Courts: A Case Study in Alabama* (1998).

Guidance from this Court is urgently needed in order to impress upon trial courts the importance of adhering to the strict constitutional and statutory limitation imposed upon class actions -- including limitations on choice of law, protection of litigants' rights to litigate facts that may be unique to individual class members, and requirements that notice and an opportunity to be heard be provided to all who are purportedly to be bound by any judgment entered in a class action.

II. THE TRIAL COURT'S NOTICE ORDER CANNOT BE SQUARED WITH THIS COURT'S PRECEDENTS REQUIRING ACTUAL NOTICE

Crucial to the "success" of abusive class actions is a trial court order absolving the class representatives of the requirement that they provide actual notice of the suit to absent class members, either by personal service or by mail. Because the proposed class in such suits typically numbers in the millions, an order requiring mailed notice would be prohibitively expensive for the class representatives and would likely cause them to abandon the suit.

The trial court obliged in this case, by entering a notice order that did not require Respondents to mail notice of the suit to a single class member, despite State Farm's offer to provide the names and addresses of 1.8 million class members for such a mailing. Instead, the trial court permitted Respondents to provide notice by publishing a series of newspaper and magazine advertisements, supplemented with a public relations campaign on the Internet. Pet. App. 23a, 28a. The notice order is at odds with a long line of decisions from this Court, which invariably have held that the Due Process Clause requires

at a minimum that notice be mailed to each affected party for which an address is available.[3]

The Court squarely addressed notice requirements in the class action context in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). The Court held that under Fed.R.Civ.P. 23(c)(2), "[i]ndividual notice [of a pending Rule 23(b)(3) class action] must be sent to all class members whose names and addresses may be ascertained through a reasonable effort." *Eisen*, 417 U.S. at 173. The trial court sought to distinguish *Eisen* on the ground that *Eisen* was based on the Federal Rules of Civil Procedure, which are not binding on Illinois courts; the court noted that Rule 23(c)(2) "is *less flexible* than 735 ILCS 5/2-803, which provides Illinois state courts with considerably more discretion to determine what kind of notice is required by

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[3] It is well settled that defendants such as State Farm have standing to complain that a trial court has not required that adequate notice be provided to absent class members, even though the constitutional right being infringed belongs to the absent class members. In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1988), the Court made clear that defendants suffer injury-in-fact sufficient for standing purposes if they must defend a suit in which plaintiffs (due to inadequate notice) can choose not to be bound by any judgment with which they are not satisfied. The Court explained:

> Whether it wins or loses on the merits, petitioner has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata just as petitioner is bound. The only way a class action defendant like petitioner can assure itself of this binding effect of the judgment is to ascertain that the forum court has jurisdiction over every plaintiff whose claim it seeks to adjudicate, sufficient to support a defense of res judicata in a later suit for damages by class members.

Shutts, 472 U.S. at 805.

a particular rule." Pet. App. 29a (emphasis in original). But that rationale fails to address the issue raised by State Farm: how much flexibility does *the Due Process Clause* provide to Illinois state courts?[4]

Moreover, the trial court failed to appreciate the extent to which both Rule 23(c)(2) and *Eisen* are constitutionally mandated. The Court in *Eisen* explained that "the 'mandatory notice pursuant to subdivision (c)(2) . . . is designed to fulfill requirements of due process to which the class action procedure is of course subject.'" *Eisen,* 417 U.S. at 173 (quoting Advisory Committee Note). The Court cited *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and *Schroeder v. City of New York,* 371 U.S. 208 (1962), as providing the constitutional underpinnings of notice requirements and made clear that those two cases are fully applicable in the class action context. *Id.* at 174-75.

In *Mullane,* the Court held that notice and an opportunity to be heard in pending proceedings were fundamental requisites of the right of procedural due process and that notice is not constitutionally sufficient unless it is "reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane,* 339 U.S. at 314. The trial court apparently interpreted *Mullane*'s "reasonably calculated" language as a license for courts to engage in a cost-benefit analysis, and

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[4] If an absent class member in subsequent out-of-state proceedings seeks to avoid being bound by a judgment entered in this case, it is highly doubtful that a court would take into account -- in determining whether notice to the absent class member was constitutionally adequate -- that the notice complied with Illinois's civil procedure rules.

to reject notice by mail where its high costs outweigh the increased likelihood that class members will receive notice. Pet. App. 27a. *Mullane* did not sanction any such balancing process; rather, it required that notice be provided in a manner "reasonably certain to inform those affected." *Mullane,* 339 U.S. at 315. As the Court explained in *Eisen, Mullane* "held that publication notice could not satisfy due process where the names and addresses of the beneficiaries were known." *Eisen,* 417 U.S. at 174.

The Court reiterated its absolute preference, as a matter of constitutional law, for mailed notice over notice by publication in *Schroeder.* 371 U.S. at 212-13. The Court termed notice by publication "a poor and sometimes a hopeless substitute" for more direct forms of notice, and said that its "justification is difficult at best." *Id.* at 213. *Eisen*'s citation to *Schroeder* strongly supports a conclusion that the Court viewed Rule 23(c)(2)'s individual notice requirement as mandated by the Due Process Clause.

Any doubts on that score were laid to rest by *Shutts,* a case that directly addressed the due process requirements that must be met before an absent class member can be bound by a state-court judgment. The Court relied explicitly on both *Mullane* and *Eisen* in holding that in such circumstances, the Due Process Clause prohibits a State from binding an absent class member to a court judgment unless he has received at least the level of notice required by *Mullane*, that is, notice "'reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Shutts,* 472 U.S. at 812 (quoting *Mullane,* 339 U.S. at 314). Because *Mullane* and *Eisen* had made clear that notice as so defined meant, at a minimum, sending notice to all interested parties whose

names and addresses could reasonably be ascertained, *Shutts*'s citation to *Mullane* and *Eisen* can only mean that the notice-by-mail requirement applies fully in the state-court class action context.

The trial court appears to have assumed that mailed notice can be excused whenever it is not "practicable" -- i.e., whenever, the costs of mailed notice would make the costs of maintaining the class action prohibitively expensive. *See, e.g.*, Pet. App. 28a-30a. But as the Court noted in *Eisen* and again in *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231 (1997), notice requirements "may not be relaxed based on high cost." *Amchem*, 117 S. Ct. at 2247 (citing *Eisen*, 417 U.S. at 173-77). Indeed, the Court suggested in *Amchem* the possibility that huge plaintiff classes may never be permissible because it is a "grav[e] . . . question whether class action notice sufficient under *the Constitution* and Rule 23 could ever be given to legions so unselfconscious and amorphous." *Amchem*, 117 S. Ct. at 2252 (emphasis added).

The trial court attempted to bolster its notice order by stating that the publication plan outlined by Respondents would actually provide better notice to class members than would mailed notice. Pet. App. 27a-28a. Suffice to say that this rather fanciful notion cuts against the collective wisdom of several generations of courts and public relations experts. *See, e.g., Eisen*, 417 U.S. at 175 ("[N]otice by publication has long been recognized as a poor substitute for actual notice.") If magazine and newspaper advertisements really were superior to direct mail in terms of drawing the attention of targeted segments of the public,

then marketers who rely heavily on direct mail have been acting in a highly irrational manner.[5]

Moreover, if the trial court is correct that mailed notice would not by itself provide effective notice to class members, then *Mullane* and *Eisen* suggest that the proper response would have been to order a print advertising campaign to *supplement* mailed notice, not to replace it. Nothing in those decisions suggests that due process permits trial courts to decide on a case-by-case basis that notice by publication alone provides the best practicable means of providing notice to class members. Trial courts are bound by this Court's directives regarding due process requirements until such time as the Court decrees, from the wisdom of experience, that notice by publication alone is no longer highly disfavored. At the very least, the Court should grant review to clarify this point, given that past directives regarding notice by publication are being increasingly ignored by trial courts.

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[5] One could reasonably assume that magazine publishers are among the most knowledgeable regarding the effectiveness of print marketing in reaching highly specific markets. If so, then there is a lesson to be learned from the manner in which magazine publishers promote themselves to the targeted audiences likely to purchase their magazines: virtually all of their promotional dollars go into direct mail, while virtually none goes into print advertising. *See* J. Edmonson, "Publishers' Anti-Ad Attitude Worsening," Business Marketing (Oct. 1, 1995).

III. STATE FARM WILL LOSE ALL OPPORTUNITY FOR EFFECTIVE REVIEW OF THE NOTICE ISSUE UNLESS REVIEW IS GRANTED NOW

Although review of the Illinois Supreme Court's judgment in this case unquestionably falls within this Court's jurisdiction, the Court is understandably reluctant to grant discretionary review in cases in which (as here) the underlying merits of the plaintiffs' claims have yet to be decided.

But such concerns should not prevent the Court from granting review in this case. This is so because unless review is granted, State Farm will lose all opportunity for effective review of the trial court's decision to dispense with mailed notice.

As the Court noted in *Shutts*, a defendant in a class action has a strong interest in ensuring that the entire plaintiff class is as bound by any judgment entered in the case as it is. *Shutts*, 472 U.S. at 805. If, as State Farm alleges, the notice by publication approved by the trial court is constitutionally inadequate, then absent class members will not be bound by any judgment entered in the case. State Farm will be forced to litigate in a heads-I-win-tails-you-lose atmosphere; any victory at trial would be pyrrhic because it would not protect State Farm from future lawsuits brought by absent class members dissatisfied with the judgment.

Moreover, if State Farm were to prevail on the merits at trial, it would have no adverse judgment to appeal from and thus would lose all opportunity to seek review of the notice order. Additionally, any further challenge to the

notice order following a victory on the merits would serve only to encourage additional lawsuits being filed against State Farm by absent class members.

Accordingly, if State Farm is to obtain any effective review of the notice order, it must be now. Just as in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), immediate appellate review of a matter is warranted when, as here, the matter could not be reviewed effectively on appeal from the final judgment. *Cohen*, 337 U.S. at 546.

CONCLUSION

Amici curiae Washington Legal Foundation, *et al.*, respectfully request that the Court grant the Petition.

Respectfully submitted,

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Dated: August 21, 1998

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AUG 21 1998

NO. 97-2063

In the Supreme Court of the United States

OCTOBER TERM, 1997

STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

THE HONORABLE JOHN SPERONI,
TAMMY SNIDER AND MICHAEL AVERY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ILLINOIS SUPREME COURT

MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF and *AMICUS CURIAE* BRIEF SUPPORTING PETITION FOR A WRIT OF CERTIORARI

(Filed In Support of State Farm Mutual Automobile Insurance Company)

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TAMMY SNIDER AND MICHAEL AVERY,

Respondents.

On Petition for a Writ of Certiorari to the Illinois Supreme Court

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MOTION OF THE OFFICE OF PUBLIC INSURANCE COUNSEL FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPORT OF PETITIONER

The Office of Public Insurance Counsel (OPIC) hereby moves pursuant to Rule 37 of this Court, for leave to file an *amicus curiae* brief in support of Petitioner. The motion is necessitated by the withholding of consent by Respondent the Honorable John Speroni.

OPIC is a Texas state agency charged with assessing the impact of insurance rates, rules, laws and forms on

insurance consumers in Texas, and advocating the rights of Texas insurance consumers as a class.

The issues presented in this case of are of great significance to Texas insurance consumers. Whether Texas residents who are joined in a class action outside the exterior boundaries of their state and who have no significant contacts with the distant forum can be subject to the substantive laws of that forum concerning their claims is of fundamental importance to Texas consumers purchasing automobile insurance in Texas. Texas consumers' expectations are that the full authority and protections of Texas law be available to Texas consumers for claims arising out of automobile insurance policies issued to them. Specifically, the Texas substantive laws which correspond to the Illinois substantive law applied in the underlying class action provide greater consumer protections and rights. Consequently, application of the Illinois law in the underlying case conflicts with the corresponding Texas substantive law to the detriment and injury of Texas consumers.

OPIC believes its brief will provide the Court with relevant legal and factual information not already brought to the Court's attention. First, OPIC's brief focuses on the difference between Texas law and Illinois law sought to be applied in the instant action to Texas consumers and the deleterious effect application of Illinois law will have on Texas consumers. Second, OPIC's brief discusses the constitutional impact of the application of Illinois law to Texas consumers who have tenuous contacts with Illinois in that it violates the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Act of the U.S. Constitution.

In order to bring these particular issues to the attention of the Court, OPIC requests leave to file its *amicus* brief submitted herewith.

Respectfully submitted,

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No. 97-2063

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STATE FARM MUTUAL
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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ILLINOIS SUPREME COURT

BRIEF OF AMICUS CURIAE

INTEREST OF *AMICUS CURIAE*

The Office of Public Insurance Counsel (OPIC) of the State of Texas respectfully files this *amicus curiae* brief in support of the position of Petitioners State Farm Mutual Automobile Insurance Company that the laws of Illinois should not be applied to Texas plaintiffs' claims in the class action lawsuit underlying this appeal.

OPIC is a Texas state governmental agency charged with assessing the impact of insurance rates, rules, laws and forms on insurance consumers in Texas, and advocating the

rights of Texas Insurance consumers as a class. TEX. INS. CODE ANN. art 1.35A (Vernon Supp. 1998) *Amicus curiae* is filing this brief because the issue of whether Texas residents who are joined in a class action outside the exterior boundaries of their state and who have no significant contacts with the distant forum can be subject to the substantive laws of that forum concerning their claims is of fundamental importance to Texas consumers purchasing automobile insurance in Texas. Texas consumers' expectations are that the full authority and protections of Texas law be available to Texas consumers for claims arising out of automobile insurance policies issued to them. To subvert these expectations by substituting Illinois law for Texas law is fundamentally unfair to Texas consumers' expectations concerning the appropriate manner insurers licensed in Texas should conduct their business with them. Specifically, the Texas substantive laws which correspond to the Illinois substantive law applied in the underlying class action provide greater consumer protections and rights. Consequently, application of the Illinois law in the underlying case conflicts with the corresponding Texas substantive law to the detriment and injury of Texas consumers.

Respondent, the Honorable John Speroni, withheld consent for OPIC to file this *amicus curiae* brief. Hence, OPIC has filed a separate Motion for Leave to File an *amicus curiae* brief in support of Petitioner.

SUMMARY OF THE ARGUMENT

OPIC is not addressing whether the notification ordered

by Judge Speroni[1] in the underlying court action is constitutionally defective. OPIC's argument focuses on whether, as a matter of constitutional law, Texas citizens who are joined in a class action outside the exterior boundaries of their state and who have no significant contacts with the distant forum may be subject to the substantive laws of that forum regarding its claims against State Farm Mutual Automobile Insurnace Company ("State Farm"). The interests at stake for Texas citizens are substantial should Illinois not apply Texas law in the underlying case regarding their claims.[2] Hence, the arguments set out in this brief are meritorious to ensure Texas citizens will be heard by this Court in its deliberations.

It is fundamentally unfair to apply Illinois substantive

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1 Re: *Snider v.State Farm Mutual Automobile Ins. Co.*, No. 97-L-114 (Ill. Cir. Ct. 2-11-98) (*Order Setting Exclusion Request Deadline, Approving Form of Notice of Class Certification; and Directive Implemention of Notice Plan*), (Petitioner's Brief, Appendix 1).

2 It is not clear from the record presented by Petitioner that the Illinois court has foreclosed the application of Texas law to the claim of Texas citizens in the underlying case. In his order certifying the Plaintiff case that includes Texas citizens, Judge Speroni stated:

> While it is not necessary for the Court at this time to decide upon choice of law as to the breach of contract claim, it does note that the eventual decision as to choice of law will not prevent the certification of the class in this case. ... The Court retains the right to divide the litigation into a manageable number of sub-classes under 2-802(b) should differences in law present themselves.

Snider v. State Farm, No 97-L-114 (Ill. Cir. Ct. Dec. 5, 1997) (*Order & Findings That Action may be Maintained as a Class Action For Breach of Contract, Consumer Fraud & Equitable Relief Claim.*) (Petitioner's Brief, Appendix B,p. 11a).

law to claims of Texas citizens arising out of the business of insurance. Texas strenuously regulates the business of insurance occurring within its borders. It is a matter of state concern acknowledged and protected against interference by federal law. McCARRAN-FERGUSON ACT, 15 U.S.C.A. §§ 1011, 1012 (1997). The business of insurance in this case relates to automobile insurance, one of the most, if not the most, state-regulated lines of insurance written in Texas. No licensed insurer can issue an automobile policy in Texas that provides lesser coverage than the standard policy promulgated by the Commissioner of the Texas Department of Insurance.[3] Further, state law which is incorporated into every policy of insurance issued to Texas policyholders mandates that the law of Texas govern the provisions of the policy. Consequently, both the state of Texas and Texas consumers' intentions are that the full authority and protections of Texas law be available to Texas consumers for claims arising out of auto insurance policies issued to them. To subvert these intentions by substituting Illinois law for Texas law is fundamentally unfair to Texas consumers' expectations concerning the appropriate manner insurers licensed in Texas conduct their business with them. This is contrary to Texas consumers' due process rights under the U.S. Constitution.

In addition, Illinois law conflicts with Texas law to the detriment of Texas consumers. Texas consumers have two causes of action available to address insurer deceptive trade

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3 The Texas Department of Insurance is the state agency created to regulate the business of insurance in Texas. TEX. INS. CODE. ANN. art. 1.101A (Vernon Supp. 1998). Previous to September 1, 1993, the agency was under the direction of a three member State Board of Insurance. Effective September 1, 1993, the Legislature abolished the Board and its functions are now performed by the Commissioner of Insurance.

practices. Unlike Illinois, Texas ensures its consumers are protected against deceptive trade practices regardless of whether the insurance producers knew the acts committed were violations of the Act. Consumers also have additional state laws incorporated into their policies that address the issues in contest in the case below — whether State Farm can refuse to indemnify insureds for the cost of factory authorized repair parts but instead limit the indemnification to the cost of repair parts that are not factory authorized. These Texas laws reflect a state policy towards unfair trade practices that is far more rigorous and far more reaching in its protection of Texas consumers than the corresponding Illinois laws. Moreover, Illinois does not have significant contacts with the claims asserted by Texas plaintiffs. Texas plaintiffs are neither residents of Illinois nor employees daily commuting to and working within the borders of Illinois. The underlying policies of insurance issued to Texas consumers were issued for delivery in Texas. The only contact Illinois can assert is that State Farm is domiciled in Illinois, an insufficient contact to meet constitutional standards.

ARGUMENT

Application of Illinois substantive law to the claims of Texas Plaintiffs would violate Texas consumers rights under the Full Faith and Credit Clause of Art. IV § 1 and the Due Process Clause of the Fourteenth Amendment of the U. S. Constitution.

Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981) and *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797 (1985) provide guidelines for the selection of the choice of law by a forum with multistate claims for withstanding constitutional

scrutiny under the Full Faith and Credit Clause of Art. IV § 1[4] and the Due Process Clause[5] of the Fourteenth Amendment to the U. S. Constitution. These guidelines seek to prevent parochial entrenchments by the forum state upon the interests of other states (*Thomas v. Washington Gas Light Co.*, 448 U.S. 261 at 272 (1980)) and to provide fundamental fairmess for non-resident parties. *Phillips,* 472 U.S. at 818. *Phillips* and *Allstate* hold that for Illinois to apply its law to Texas plaintiffs it must have a significant contact or significant aggregation of contacts, creating state interests over those claims and that the Illinois selection of its laws is not arbitrary or fundamentally unfair to Texas plaintiffs. *Phillips,* 472 U.S. at 818. *Allstate,* 449 U.S. at 313. Of course, the threshold question is whether the relevant Texas law conflicts with the Illinois law applicable to the underlying case. Without conflict, Texas plaintiffs would suffer no injury and without injury there is no real controversy to be resolved by this Court. *Phillips,* 472 U.S. at 815.

Here, the relevant Texas law conflicts with the corresponding Illinois law applicable to the underlying case to the detriment of Texas consumers. The underlying case is a suit alleging damages caused by State Farm's breach of contract with its policyholders and State Farm's violation of the Illinois Consumer Fraud and Deceptive Business

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4 The Full Faith and Credit Clause. Art. IV § 1 provides "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other state. And the Congress may by general laws prescribe the manner in which such Acts, Records, and Proceedings shall be proved, and the effect thereof."

5 The Due Process Clause of the Fourteenth Amendment provides that no state "shall. . .deprive any person of life, liberty, or property without due process of law..."

Practices Act (the "CFA"), 815 ILCS 505/1 et. seq. Consumers' rights under the CFA are more restrictive than Texas' corresponding laws. Unlike Illinois, Texas provides consumers with two private causes of action — the Deceptive Trade Practices - Consumer Protection Act, TEX. BUS. AND COM. CODE ANN. § 17.41 et. seq. (Vernon 1987 and Vernon Supp. 1998) ("DTPA") and the Unfair Competition and Unfair Practices Act, TEX. INS. CODE ANN. art. 21.21 (Vernon 1981 and Vernon Supp. 1998) ("art. 21.21"). While the CFA permits recovery of attorney fees within the discretion of the judge, the DTPA provides recovery of court cost and reasonable and necessary attorney fees as a matter of right should the consumer prevail. DTPA § 17.50. In addition, the CFA limits insurance producer liability to those acts the producer knows are misleading or deceptive CFA § 10(b). Art. 21.21 protects Texas consumers against insurance producers performing unfair trade practice acts regardless of whether the producer has actual knowledge that the act is prohibited. art. 21.21 § 16. In addition, Texas law places legal liability upon adjusters for deceptive trade practices. art. 21.21 § 2. Texas law provides more extensive protections against unfair trade practices which include a subsection specifically addressing unfair claim settlement practices. art. 21.21 § 4(10). Texas law also makes it an unfair trade practice to fail to "disclose any matter required by law to be disclosed, including a failure to make disclosure in accordance with another provision of this code." art. 21.21 § 4(11)(e). This is a significant Texas consumer right in relation to this case because Texas law requires disclosures to beneficiaries or third-party claimants regarding their claim settlement relating to the repair of their automobiles. TEX. INS. CODE ANN. art. 5.07-1 (Vernon Supp. 1998). Art 5.07-1 provides

consumer rights under Texas policies[6] in addition to the rights alleged by the Illinois court. The article sets out specific rights consumers have involving their choice of vendor or service providers regarding the repair of their automobile. Texas law also places the burden of proof relating to policy exclusions or exceptions from coverage upon the insuer. TEX. INS. CODE ANN. art. 21.58 (Vernon Supp. 1998). Lstly, applying Illinois law conflicts with Texas law requiing insurance policies payable to Texas citizens or inhabitants by an insurer doing business in this state be governed by Texas law. TEX. INS. CODE ANN. art. 21.42 (Vernon 1981), *Rockwood Ins. Co. v. Williamson*, 596 F.Supp. 1524. (N.D. Texas 1984). These corresponding Texas laws establish greater rights and provide greater consumer protections for Texas plaintiffs than their Illinois counterparts set ou in the underlying case. Failure to apply Texas substantive lws to Texas claims in the case below will deny the Texas plintiffs these greater rights and protections to their detrimnt.

The business of insurance is of public concern and ubject to strict regulation and control by Texas. *Hamaker*, 93 S.W.2d 893. Texas' purpose of regulating insurance i to serve the public interest in that business as well as to rotect the rights of both insurer and insured. *Glenn Falls ns. Co. v. McGowan*, 236 S.W.2d 108, 109 (Tex. 1951). The business of insurance is a matter of state concern acknowldged and protected against interference by federal aw. McCARRAN-FERGUSON ACT, 15 U.S.C.A. §§ 1011, 1012

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6 It is well settled Texas law that statutes bearing on the subject matter of the contract become a part of the contract just as though they had been copied therein. *Harkins v. Indiana Mutual Ins. Co.*, 234 S.W.2d 430, 431 (Tex. Civ. App.—Galveston 1950, no writ hist.) *See also Hamaker v. American States Ins. Co. of Texas*, 493 S.W.2d 893, 895 (Tex. Civ. Ap.—Houston [1st Dist.] 1973 ref. n.r.e.)

(1997). The impact of State Farm's insurance operations on the business of insurance within the state of Texas is significant. The State Farm Group of which State Farm is the principal writer is the leading writer of automobile insurance comprising 25.8% of the Texas market with premium volume of $2.1 billion as of the 4th quarter of 1997[7], the most recent date data is available. Texas Dept. of Insurance, "Quarterly Legislative Report on Market Conditions, 4th Quarter 1997" (TDI—July 23, 1998). Texas enforces its public policy through a pervasive system of regulation which includes the laws stated above. Under Texas law, no insurer may issue an automobile policy in Texas that provides lesser coverage than the standard policy promulgated by the Commissioner of the Texas Department of Insurance. TEX. INS. CODE ANN. art. 5.06 (Vernon Supp. 1998). The rates State Farm may charge for its automobile insurance policies are regulated. TEX. INS. CODE ANN. art. 5.101 (Vernon Supp. 1998). State Farm's operations are closely monitored by the Texas Department of Insurance. TEX. INS. CODE ANN. arts. 1.15, 1.15A (Vernon Supp. 1998). Texas' interests in ensuring State Farm's conduct with Texas consumers is consistent with its public policy as set out in its system of regulation is substantial. The application of Illinois law to Texas claims is based on nothing more than the fact that State Farm is domiciled in Illinois. This tenuous nexus to State Farm's actions occurring within the boundaries of Texas does not justify the usurpation of Texas' authority to regulate State Farm's operations occurring within its boundaries. Applying Illinois law to Texas claims in this instance results in unreasonably and unfairly imposing Illinois public policy on

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7 Of this amount, State Farm wrote $2.07 billion of the Group's total premiums.

Texas contrary to the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution. *BMW of North America, Inc. v. Gore,* ____ US ____, 116 S.Ct. 1589 (1996).

Illinois contact with Texas plaintiffs and the occurrence or transaction is insignificant. Texas plaintiffs do not reside in Illinois, nor do they commute to or work within the boundries of Illinois on a daily basis as in the fact situation underlying *Allstate,* 449 U.S. 304. It is not relevant whether Texas plaintiffs did not elect to opt out of the underlying class action. *Phillips,* 472 U.S. at 820. the likelihood that any Texas plaintiff's claim relates to an accident occurring within Illinois is fortuitous and unsupported by the record before this Court. Illinois contact with Texas claims and plaintiffs is that State Farm is domiciled in that state. This contact is insufficient to provide the minimum contacts necessary to apply Illinois laws to Texas claims consistent with the Due Process Clause of the Fourteenth Amendment to the U. S. Constitution and the Full Faith and Credit Clause of Art. IV § 1 of the U.S. Constitution.

The application of Illinois law to Texas plaintiffs is fundamentally unfair. As brought out above, it unreasonably imposes Illinois policy on the state of Texas and its citizens. In addition, the application of Illinois law to Texas claims is contrary to the expectations of the parties. The expectations of the parties emanate from contractual commitments established pursuant to automobile insurance policies to indemnify Texas plaintiffs for losses incurred under their policies. Texas law, which is incorporated into every automobile insurance policy issued in Texas[8], mandates that

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[8] It is well-settled Texas law that statutes bearing on the subject

the law of Texas govern the provisions of the policy. TEX. INS. CODE ANN. art. 21.42 (Vernon 1981). Specifically, this statute reads as follows:

> Any contract of insurance payable to any citizen or inhabitant of this State by any insurance company or corporation doing business within this State shall be held to be a contract made and entered into under and by virtue of the laws of this State relating to insurance, and governed thereby, notwithstanding such policy or contract of insurance may provide that the contract was executed and the premiums and policy (in case it becomes a demand) should be payable without this State, or at the home office of the company or corporation issuing the same.

Moreover, commonsense dictates that the parties expect that the consumer protection laws and the other laws regulating the business of insurance within the state passed by Texas legislators as representatives of its citizens would apply to insurer acts involving Texas citizens and regarding Texas claims occurring within the boundaries of Texas. Consequently, applying Illinois law to Texas claims in the underlying class action is contrary to the reasonable expectations of the parties, and is therefore, fundamentally unfair.

---

footnote 8 continued

matter of the contract become a part of the contract just as though they had been copied therein. *Harkins v. Indiana Mutual Ins. Co.*, 234 S.W.2d 430, 431 (Tex. Civ. App.—Galveston 1950, no writ hist.). *See also Hamaker v. American States Ins. Co. of Texas*, 493 S.W.2d 893, 895 (Tex. Civ. App.—Houston [1st Dist.] 1973 ref. n.r.e.)

CONCLUSION

Application of Illinois substantive law to Texas plaintiffs' claims in the underlying class action is constitutionally impermissible. The State of Illinois' contacts with Texas plaintiffs and their claims are constitutionally insignificant. Moreover, the effect of applying Illinois substantive law to Texas claims arising from insurer activities occurring within the boundaries of Texas unreasonably and unfairly imposes Illinois public policy on Texas and its residents to the detriment and injury of Texas consumers, contrary to their rights guaranteed under the Due Process Clause of the Fourteenth Amendment in the U. S. Constitution. Lastly, the Illinois law applied in the underlying case is inconsistent with corresponding Texas law to the detriment and injury of Texas consumers and is contrary to Texas plaintiffs' reasonable expectations established by contract.

For these reasons, Texas substantive law should be applied to Texas ... plaintiffs' claims in the underlying class action. Application of Illinois substantive law to these Texas claims should be determined constitutionally impermissible.

Respectfully submitted this _____ day of _____, 1998.

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Supreme Court of the United States

October Term, 1997

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

against

THE HONORABLE JOHN SPERONI,
TAMMY SNIDER and MICHAEL AVERY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
ILLINOIS SUPREME COURT

BRIEF OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ON PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

BRIEF OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF *AMICUS CURIAE*

The State of New York submits this brief *amicus curiae* in support of the petition for a writ of certiorari by State Farm Mutual Automobile Insurance Company. New York objects to the judgment of the Illinois Supreme Court leaving intact the Illinois Circuit Court's grant of plaintiffs' motion to certify a nationwide class of approximately 5,000,000 insurance policyholders in 48 states in litigation raising, among other things, consumer fraud claims to be governed by Illinois law.

New York has a significant interest in having this Court review the decision to certify a nationwide class in this matter.

State Farm is the largest auto insurer in the United States, providing automobile insurance coverage to one out of every five insured drivers nationwide. State Farm insures close to 13.1% of the New York private passenger auto market, making it the second largest automobile insurer in the State. Approximately 1.24 million automobile physical damage policies are written by State Farm each year for New York residents, generating approximately $324 million in insurance premiums. Roughly 40% to 50% percent of the premiums charged in New York for comprehensive and collision coverage is attributable to coverage for physical damage to vehicles, which includes the coverage for replacement parts.

The claims in this case concern State Farm's practice of using nonoriginal equipment manufacturer ("non-OEM") replacement parts in the repair estimates for damaged automobiles, where the non-OEM parts are priced lower than original equipment manufacturer ("OEM") parts.The several states have adopted varying regulations with regard to the use of non-OEM parts. Some states, as in New York, permit and indeed encourage the use of these parts, while other states require their use. *See Petition*, n.7.

The Illinois court has ruled that the issue of whether State Farm's policy of using non-OEM parts constitutes a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act is appropriate for class resolution. The order of class certification will thus result in the application of Illinois law to the claims of New York policyholders, as well as those of 47 other states, all of whom contracted with State Farm subject to the various regulations of those separate states. This raises the significant question of whether a state is protected against the extraterritorial application of another state's law in possible contravention of its own regulatory preferences, and of the sovereign right of each state to regulate the business of insurance within its own geographical boundaries.

SUMMARY OF ARGUMENT

Allowing this matter to proceed as a nationwide class action sets up a very real potential for conflict between the extraterritorial application of Illinois law and each state's own regulatory scheme to the detriment of the sovereign right of every state to regulate the business of insurance within its borders. Moreover, given the ever-present possibility of settlement in a nationwide class action, the Court may never have any other opportunity to review this order, which could directly intrude upon and undermine the several states' ability to implement their own regulatory choices.

ARGUMENT

I

PERMITTING THIS NATIONWIDE CLASS ACTION TO PROCEED WOULD ALLOW THE COURT OF ONE STATE TO OVERRIDE THE POLICIES AND REGULATIONS OF OTHER STATES AND SEVERELY IMPEDE THE ABILITY OF THE INDIVIDUAL STATES TO REGULATE THE BUSINESS OF INSURANCE

The United States Constitution has as one of its fundamental precepts a respect for the sovereignty of the individual states. As this Court long ago explained:

> The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no

> tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions.

Pennoyer v. Neff, 95 U.S. 714, 720-722 (1877).

This principle of state sovereignty is embodied not only in the federal Constitution but in federal legislation as well. Its relevance here is most apparent in the McCarran-Ferguson Act of 1945, 15 U.S.C. § 1011 *et seq.*, where Congress declared that "the business of insurance, and every person engaged therein, shall be subject to the laws of the several states," 15 U.S.C. § 1012(a), thereby emphasizing the primacy of state regulation of insurance. *See generally United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 500 (1993).

In ruling that this action may be maintained as a class action, the Illinois court determined that the question of whether State Farm's practice of using non-OEM parts constitutes a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act is a common issue appropriate for class resolution under Illinois law. *Petition*, App. 9a. If this determination is permitted to stand, a single state court could effectively disrupt the entire system of individual state insurance regulation, contrary to the McCarran-Ferguson Act and the underlying constitutional precepts of individual state sovereignty.

The State of New York has a carefully calibrated regulatory scheme setting forth "standards for prompt, fair and equitable settlement of motor vehicle physical damage claims." 11 NYCRR § 216.7. That regulatory scheme, based, *inter alia*, on a policy of cost control, allows an insurer's repair estimate to be

based upon the use of nonoriginal equipment manufacturer crash parts[1], as follows:

> (5) If the insurer's repair estimate is based upon the use of any non-OEM crash part:
>
> (i) the estimate shall specify the non-OEM or non-OEM supplier;
>
> (ii) the insurer shall not, without consent of the insured or the insured's designated representative, specify non-OEM crash parts from more than three different suppliers for any one repair;
>
> (iii) the crash part shall equal or exceed the comparable OEM crash part in terms of fit, form, finish, quality and performance;

---

[1]The regulation defines "crash part" to mean "a part of a motor vehicle, which (i) is made of sheet metal, plastic, fiberglass, or similar material, including a door, fender, panel, bumper, hood, floor or trunk lid, but not including windows or hubcaps; and (ii) constitutes or provides support for the motor vehicle's exterior." 11 NYCRR § 216.7(a)(6). "Original equipment manufacturer" or "OEM" is defined to mean "a motor vehicle manufacturer or distributor that produces or markets, under its own name, crash parts for use in motor vehicles that it manufactures or distributes under its own name." 11 NYCRR § 216.7(a)(7). "Nonoriginal equipment manufacturer" or "non-OEM" means "a manufacturer or distributor (including any entity supplying the required warranty other than a manufacturer), that produces or markets, under its own name, crash parts for use in motor vehicles that it does not manufacture or distribute." 11 NYCRR § 216.7(a)(8).

(iv) the crash part must be warranted by the non-OEM at least to the extent and duration as the comparable OEM crash part;

(v) the insurer shall specify only certified crash parts, in regard to any part that has been duly certified by a qualified certifying entity acceptable to the superintendent;

(vi) if the crash part has not been certified by a qualified certifying entity acceptable to the superintendent, the non-OEM must issue a written warranty, for at least the period of the insured's ownership of the vehicle, that the crash part equals or exceeds the comparable OEM crash part in terms of fit, form, finish, quality and performance; and

(vii) the insurer shall cause the damaged vehicle to be restored to its preloss condition consistent with the non-OEM warranty, at no additional cost to the insured and within a reasonable time, if the non-OEM fails to honor its warranty required in subparagraph (iv) or (vi) of this paragraph.

11 NYCRR § 216.7(b)(5).

This regulatory provision is designed to balance consumer interests by permitting competition to operate in the pricing of repair parts while assuring that only quality and warranted parts will be used in repair estimates. Consumer cost containment is the primary goal.

The certification of a nationwide class action in which the claims of all State Farm policyholders are to be adjudicated based on Illinois law sets up the very real potential for conflict between the extraterritorial application of the Illinois statute and New York's carefully crafted regulatory scheme governing its insurance industry. If State Farm's policy on use of non-OEM

parts is found to violate the Illinois consumer fraud statute as applied to a national class, it can be anticipated that not only State Farm but all insurers will immediately change their claims handling practices to specify the use of only original equipment crash parts in repair estimates to avoid statutory liability. This would directly intrude upon and undermine New York's ability to implement its policy of cost containment as articulated in the aforestated regulation.

Allowing an Illinois court to apply its own law to override the regulatory choices of the various states would certainly be contrary to the spirit, if not the letter of the McCarran-Ferguson Act. *See F.T.C. v. Travelers Health Assn.*, 362 U.S. 293, 300-302 (1960) (noting that it would be inconsistent with the purposes of the Act to "delegat[e] to any one State sole legislative and administrative control of the practices of an insurance business affecting the residents of every other State in the Union"). The application of the Illinois law here could effectively sweep aside the multiple and distinct policy reasons for each state's own regulatory structure. Such an override of state policy and regulation could occur in every state in which a member of the class resides -- a total of 48 states in all. Moreover, it would likely lead to the situation in which State Farm is required under the laws and regulations of one state to specify the use of non-OEM parts while being held liable for doing so under the laws of another. *See Petition*, n.7.

The nationwide class certification threatens these results on the slender justification of facilitating litigation and preserving scarce judicial resources both in Illinois and other states. *Petition*, App. 6a. While these are laudable goals, they are insufficient to overcome principles of state sovereignty and comity to allow a state to "legislate" beyond its borders. *See BMW of North America v. Gore*, 517 U.S. 559, 568-69, 572-73 (1996) ("No one doubts that a State may protect its citizens by prohibiting deceptive trade practices...But the States need not,

and in fact do not, provide such protections in a uniform manner....Alabama may insist that BMW adhere to a particular disclosure policy in that State. Alabama does not have the power, however, to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents. Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions.").

II

IMMEDIATE REVIEW IS REQUIRED IN ORDER TO PREVENT THE COMPROMISE OF NEW YORK'S ABILITY TO REGULATE THE BUSINESS OF INSURANCE EFFECTIVELY.

Review of the order of class certification at this stage of the litigation is necessary in order to avoid the immediate potential for conflict among the several states. If settlement occurs, an order which impermissibly calls for the extraterritorial application of Illinois law will never be reviewed. Indeed, whether or not settlement occurs here, the order of class certification immediately impacts New York's sovereign right freely to regulate its own insurance industry, by creating the potential that the law of another state may be deemed applicable, in any class action, to the conduct of the insurance business in this State. New York has every interest in protecting its insurance laws, regulations, and policies against such a compromise.

CONCLUSION

For the foregoing reasons, New York, as *amicus curiae*, respectfully urges the Court to grant the petition for a writ of certiorari.

Dated: New York, New York
August 21, 1998

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Respondents.

On Petition for Writ of Certiorari to the Illinois Supreme Court

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS IN SUPPORT OF THE PETITION FOR CERTIORARI

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BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS IN SUPPORT OF THE PETITION FOR CERTIORARI

This matter concerns a nationwide class action for damages based upon the application of one state's consumer fraud statute to insurance practices in 47 other states. The underlying misconduct alleged relates to a practice that insurance regulators in some of these 47 states allow or even require, but that insurance regulators in other states restrict.

The National Association of Insurance Commissioners ("NAIC"), whose members are the chief state insurance regulators, is committed to the protection of insurance consumers in each of the 50 states and territories. The NAIC supports the use of class action lawsuits brought by insurance consumers under certain conditions, and wishes clearly to state that its appearance as *amicus* for the Petitioner does not indicate a general opposition to all class actions brought by insurance consumers. Instead, the NAIC appears to apprise the Court of its opposition to this particular class action for a single reason. If it is condoned and if plaintiffs prevail, the fundamental regulatory structure embodied in the McCarran-Ferguson Act, under which the regulation of insurance is committed to each of the several states, could be threatened: for the court in the class action forum state, Illinois, could override policy decisions that legislators and insurance regulators in other states have made, based upon their views of the needs and interests of insurance consumers who reside in their own states.

INTEREST OF THE AMICUS CURIAE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS[1]

The NAIC is a voluntary unincorporated association comprised of the insurance regulatory officials with principal responsibility for supervising the business of insurance in the states, territories and insular possessions of the United States. The organization aims to help state officials achieve fundamental insurance regulatory objectives. Of overriding importance in all its activities is the protection of insurance consumers.

The NAIC believes that protection of insurance consumers is best achieved where each state regulates the policyholder-insurer relationship in accord with the unique needs of its residents. In many areas, such as solvency protections, state regulators have chosen to adopt uniform laws, and they work together, directly and through the NAIC, to enforce them. In other respects, however, the states historically have taken different paths to respond to particular geographic and economic conditions, as well as differing regulatory philosophies.

Although the NAIC provides a forum in which the states may coordinate and, where appropriate, promulgate uniform regulations, the needs and interests of

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been lodged with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amicus curiae*, their members, and their counsel, made a monetary contribution to the preparation and submission of this brief.

insurance consumers may vary significantly from state to state. For example, insurance consumers in California have obvious special insurance needs arising from the risk of earthquakes; Florida consumers have special needs arising from hurricane risk; tornados are of special concern for midwestern consumers. With respect to health, insurance regulators or legislators in one state may conclude that its residents have a particularized need for certain benefits, which are then mandated, while the regulators and legislators in neighboring states may determine that such benefits should be optional in order to keep premium levels more affordable.

The NAIC views decisions about such matters as ones that should be left to each state. Therefore, where an insurance regulator in one state has regulated a specific aspect of the insurer-policyholder relationship as applied to that state's own residents, the NAIC believes that the insurance regulatory system is best served when that regulation is respected by sister states. Accordingly, where a court in a sister state applies the sister state's substantive law of consumer fraud to the first state's regulation in a dispute involving the first state's residents, the sister state's court threatens the effective protection of the residents in the first state by countermanding the regulatory processes and judgments of the first state.

The class action in which this appeal arises involves the repair of automobiles after an accident, and specifically, the use of replacement parts. The term "Non-Original Equipment Manufacturer (non-OEM) parts" refers to those parts made by other than the original manufacturer. The several states differ in their ap-

proaches to regulation of the use of non-OEM parts for repairing insured vehicles. These differences reflect the considered judgment of the state legislators and regulators in each state as to the best interests of its own residents.

States differ in their regulation of the use of non-OEM parts generally because different regulators have assigned different value to competing considerations: the cost of repair, the impact of those costs on insurance premiums, and judgments about the quality of repair. In other words, some states favor use of non-OEM parts because of the perceived cost savings. Others disfavor such use, valuing more highly other factors, such as the quality of the OEM part.

The NAIC takes no position here about these judgments, other than to remind that under the law each state is vested with the power to make such judgments for the residents of its own state, and to make different judgments than its sister states. In order that this power be preserved, the NAIC urges reversal of the trial court's order certifying a nationwide class of insurance consumers, because the legality of Petitioner's conduct with regard to the use of non-OEM parts in each of the several states should not be judged under the standards of Illinois' Consumer Fraud Act.

ARGUMENT

The constitutional limitations on choice of law in nationwide class actions have been clearly delineated. Where there are conflicts between and among the substantive laws of the class members' home states and the substantive law of the forum state, imposition of the

forum state's law is not permitted, unless the forum state has a "'significant contact or significant aggregation of contacts' to the claims asserted by each member of the plaintiff class." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22 (1985) (quoting from *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-313 (1981)). This principle preserves the federal system by protecting the "autonomy of individual States within their respective spheres." *BMW of North America v. Gore*, 517 U.S. 559, 571 (1996) ("[A] State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." *Id.* at 572).

Here, the Illinois trial court held that it would apply the substantive provisions of Illinois' Consumer Fraud Act ("the CFA") to Petitioner's practices regarding use of non-OEM parts in 48 different states. Section 10a of the CFA, 815 Ill. Comp. Stat. 505/10a, provides a private cause of action for damages to individual consumers (including insurance consumers), for unfair or deceptive acts or practices. *E.g., Elder v. Coronet Ins. Co.*, 558 N.E.2d 1312, 1319 (Ill. App. Ct. 1990). Prevailing plaintiffs are allowed compensatory and, where appropriate, punitive damages, costs and attorney's fees. 815 Ill. Comp. Stat. 505/10a (1998).

However, the fact is that the insurance regulators in the several different states have promulgated varying regulations for use of non-OEM parts, as Petitioner details in note 7 at page 12 of its Petition For A Writ Of Certiorari. Some of these regulations vary materially from the parallel Illinois regulation. Massachusetts, for example, mandates the use of non-OEM parts in situations where Illinois conditionally allows it. *Compare*

Mass. Regs. Code tit. 211, § 133.04 (1998) *to* 215 Ill. Comp. Stat. 5/155.29 (1998). Nevertheless, if this class action is allowed to proceed, the finder of fact could well conclude that Petitioner's use of non-OEM parts in Massachusetts for Massachusetts insureds was "unfair" or "deceptive" within the meaning of Illinois' CFA.

A CFA action based on "unfairness" requires proof of a practice that, although not unlawful, offends public policy, is oppressive, and causes substantial injury. *Elder v. Coronet Ins. Co.*, 558 N.E.2d 1312, 1318-1319 (Ill. App. Ct. 1990) (denial of an insurance claim based on the results of a polygraph test may be "unfair" within the meaning of the CFA). A CFA action based on "deception" requires proof of a deceptive act or practice, made in the course of trade or commerce, with the intent that the plaintiff rely on the deception. *Siegel v. Levy Organization Dev. Co.*, 607 N.E.2d 194, 198 (Ill. 1992). The fact that the use of non-OEM parts comports with Massachusetts insurance regulations does not appear to mean that the use of them is not "unfair" to Massachusetts insurance consumers, or that those consumers cannot have been "deceived" by the conduct. And if the trier of fact finds unfairness or deception, the Massachusetts class members will be entitled to damages, and potentially other relief allowed under the CFA.

Surely such a result would be inconsistent with *Phillips Petroleum*, for there are no contacts, much less a "significant aggregation of contacts" between Massachusetts insurance consumers, whose cars were damaged and repaired in Massachusetts, and Illinois. Moreover, and ultimately more ominously, the precedent set by allowing such a nationwide class action to proceed

threatens to undermine our system of state-by-state insurance regulation, along with the overall protection of insurance consumers that state-by-state regulation aims to protect.

Use of non-OEM parts is only one of literally hundreds of examples of significant matters on which insurance regulations vary between the states. Each of the differing regulations reflects that state's view of the best interests of insurance consumers within its own borders, taking into account all relevant factors, including the specific needs of the state's insured population as well as the cost and availability of insurance.

Consider, as just one example, the different states' regulatory provisions for mandated health benefits. Some but not all states require coverage of the following treatments or conditions: off-label drug use for AIDS treatment; wigs for hair loss due to medical treatment or injury; in vitro fertilization; care for Alzheimer's disease (including nursing home care); treatment for autism; treatment of TMJ (temporomandibular joint disorders) as a medical (and not dental) disorder; prostate cancer screening; annual, routine health exams and well-baby care; reconstructive surgery after mastectomies. *See*, Appendix: Excerpts from *Mandated Benefits*, NAIC Compendium of State Laws on Insurance Topics (1998). Illinois happens to mandate coverage for reconstructive surgery after mastectomies; Indiana does not. Clearly an Illinois jury should not be given the power to decide whether an Indiana insurer that does not provide such a benefit has committed an "unfair" act that exposes it to compensatory and punitive damages. Yet, if the trial court's decision below is allowed to stand and assuming the Indiana insurer is subject to the jur-

isdiction of an Illinois court, there is no legal barrier to entrusting that delicate question, which should be entirely dependent upon Indiana's public policy determinations, to an Illinois jury sitting in a nationwide class action charging a violation of Illinois' CFA.

The NAIC recognizes that in certain instances the nationwide class action lawsuit is a significant and useful tool for protecting consumer rights apart from the administrative or regulatory remedies available through state insurance departments. Unfortunately, there is no shortage of examples of misconduct in the operation of insurance companies that is plainly prohibited in every state. *See*, *e.g.*, *United States v. Christopher*, 142 F.3d 46 (1st Cir. 1998) (defendant deceived insurance regulators in order to gain control of and loot the assets of insurance companies); *Clark v. Milam*, 872 F. Supp. 307 (S.D.W.V. 1994) (defendants misstated material information on publicly filed financial statements in order to conceal the fact that they were illegally siphoning funds out of insurer); *United States v. Blumeyer*, 114 F.3d 758 (8th Cir. 1997) (defendant engaged in deceptive transactions to conceal the insolvency of insurance company); *Schacht v. Brown*, 711 F.2d 1343 (7th Cir.), *cert. denied*, 464 U.S. 1002 (1983) (same).

But the nationwide class action suit here attacks conduct that is clearly allowed in some states, because the state legislators or regulators in those states determined that allowing the conduct was in its residents' best interest. Such decisions must not be exposed

to second-guessing by courts and juries in another state, particularly where the insurance contracts at issue were sold in and purchased by residents in states where such conduct is allowed. In short, if this nationwide class action is allowed to proceed, it could establish a precedent that would undermine our system of state-by-state insurance regulation, as the laws of particular states are trumped or re-trumped in patchwork fashion in nationwide class actions that attack, as this class action attacks, insurer conduct that is treated differently by the different states.

CONCLUSION

For all these reasons the NAIC respectfully urges that the Court grant the Petition for Certiorari.

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APPENDIX

Excerpts from NAIC's Compendium of State Laws on Insurance Topics

MANDATED BENEFITS

Over the past several years there has been increasing interest in a topic generally known as "mandated benefits." This term actually covers three subtopics:

(1) Statutes and rules requiring that certain persons be covered by health insurance policies. A good example is the Model Newborn Children Bill (Model #155 in the NAIC *Model Laws, Regulations and Guidelines*) endorsed by the NAIC in 1973. This statute requires inclusion of newly born children in the family policies of their parents from the moment of birth.

(2) Statutes and rules mandating certain illnesses or procedures be covered by health insurance policies. A good example is the Health Examination Benefits Availability Act (Model #160 in the NAIC *Model Laws, Regulations and Guidelines*) adopted in 1986. It requires offering coverage for routine physical examinations and well-baby care.

(3) Statutes and rules mandating that care by certain providers must be reimbursed if it is a covered expense. For example, in some states a statute provides that insurers must cover treatments provided by chiropractors if they would cover those same treatments provided by a medical doctor, and the chiropractor is acting within the scope of his license.

In addition to the types of mandates listed above, statutes vary in whether the coverage specified is *required* to be included in the policy or certificate, or whether it must be *offered* to the subscribers, usually with an increased cost.

This chart will focus on the second classification enumerated. State statutes or regulations providing that certain coverage must be included or offered are summarized on the following pages. A number of different coverages are required in numerous states, while a few are unique to only one or two states.

MANDATED BENEFITS:
PROSTATE CANCER SCREENINGS

STATE	CITATION	SUMMARY
CO	§ 10-16-104	Provide coverage for prostate cancer screening.
GA	§§ 33-29-3.2 (indiv.); 33-30-4.2 (group)	Annual prostate cancer screening for males 45 years of age and older, or 40 years of age and older when ordered by physician. Deductibles and exclusions subject to commissioner approval.
IL	215 ILCS 5/356u	Annual digital rectal examination and prostate-specific antigen tests upon recommendation of full-licensed physician for (a) asymptomatic men 50 and over, (b) African-American men 40 and over, (c) men 40 and over with family history of prostate cancer.
LA	§ 215.11	Coverage for detection of prostate cancer for men over age 50 and as medically necessary for men over 40. Prostate cancer testing applies to contracts issued on or after 1/1/98. Does not apply to individually underwritten plans.

STATE	CITATION	SUMMARY
NJ	17:48E-35.13 (group health serv. corp.) 17:48-6p (group hosp. serv. corp.) 17:48A-7n (group medical serv. corp.) 17B:27-46.10 (group)	Group plans must cover annual diagnostic exam, including digital rectal exam and a prostate specific antigen test for men age 50 and over and for men age 40 and over who have a family history or other prostate cancer risk factors.
NC	58-51-58	Prostate-specific antigen (PSA) test coverage with same deductibles and coinsurance as other procedures.
ND	§ 26.1-36-09.1; SB 2115 (1997)	Annual digital rectal exam and prostate-specific antigen test for males 50 and over, black males 40 and over, 40 and over if family history of prostate cancer.
TX	art. 3.70-2(H); art. 21.53F	Annual diagnostic examination for prostate cancer for men age 50 and older, or age 40 and older with family history of prostate cancer.
WV	§§ 33-15-15 (indiv.); 33-16C-4 (group)	Medical and laboratory services for annual checkup for prostate cancer for men age 50 and over.

MANDATED BENEFITS:
HEALTH EXAMINATION BENEFITS, WELL BABY CARE

STATE	CITATION	SUMMARY
AR	§ 23-79-141	Mandated offering of coverage for routine periodic physical examination to age 16, copayments and deductibles no larger than for other office visits.
CA	§§ 10123.5 (group); 11512.17 (nonprofit hospital service plan)	Mandated coverage consistent with recommendation of American Academy of Pediatrics for physical examinations through age 16; mandated offering for ages 17-18.
CT	§ 38a-535	Mandated coverage of preventive pediatric care consistent with coverage provided for other services, through age 6.
DE	tit. 18 § 3335(b)	Mandated benefit for routine care, from birth.
DC	§ 35-1102	Mandated benefit for preventive care services; unlimited visits to age 12; 3 per year for children 12-18.
FL	§§ 627.6416, 627.6579; BULLETIN 87-205	Mandated coverage for health supervision services, exempt from deductibles, to age 16.

STATE	CITATION	SUMMARY
GA	§§ 33-30-4.5 (group) 33-29-3.4 (indiv.)	Mandated benefit for periodic review of child's physical and emotional status, including immunizations, from birth through age 5. No deductibles, commissioner may provide exclusions or coinsurance amounts.
HI	§§ 431:10A-115.5, 431:10A-206.5, 432:1-602.5	Mandated benefit for health supervision services, exempt from deductibles, through age 5.
IA	Reg. 191-80.1 to 191-80.5	Preventive services from birth through age 7 are mandated for group policies. No deductibles.
KS	§ 40-2,102	Mandated coverage for immunizations to age 5.
LA	§ 22:215.14	Mandated coverage for immunizations to age 6.
MD	art. 48A §§ 354KK, 470AA, 477KK	Requires coverage of specified list of services.
MA	§ ch. 175:47C	Mandated benefits for preventive care services to age 6.
MN	§ 62A.047	Mandated benefit for child health supervision services to age 6. Exempt from deductibles, copayments and dollar limitations.

STATE	CITATION	SUMMARY
MO	§ 376.801	Mandated offer of benefits for child health supervision services through age 12. Same deductible and coinsurance as other covered services.
MT	§§ 33-22-303 (indiv.); 33-22-512 (group); 33-30-1014 (nonprofits); Reg. 6.6.2508 (HMOs)	Mandated coverage through age 2 for all health insurers, HMOs and health service corps. Services must include well-patient exams.
NJ	17B:27-26-1h (group); 17B:26-2.1h (indiv.); 17:48E-35.6 (nonprofits); 17:48-6i (nonprofits)	Mandated offer of various benefits specified.
NM	Reg. 59A-46-1-C (HMOS) §§ 59A-22-34.3; 59A-23B-3; 59A-46-38.2	Well child care from birth. Childhood immunizations, including booster doses, as recommended by American Academy of Pediatrics, shall be covered subject to deductibles and coinsurance under the policy.

STATE	CITATION	SUMMARY
NY	§§ 3216(i)(17)	Mandated coverage of preventive and primary care services to age 19, not subject to deductibles and coinsurance.
OH	§§ 3923.55 to 3923.56	Mandated benefit for health supervision services to age 9. Subject to reasonable coinsurance and deductibles. Benefits limited to $500 first year of child's life, $150 per year thereafter.
OK	tit. 36 §§ 3201 to 3203	Must offer coverage for health supervision services through age 18.
PA	§§ 40-39-321 to 40-39-328	Requires coverage for child immunization. Coinsurance provisions apply same as other services, exempt from deductibles.
RI	§§ 27-38.1-1 to 29-38.1-3	Mandated benefit for pediatric preventative care to age 19, copayments no larger than other covered services.
UT	R590-76-4 (HMOs)	Well child care included in basic services offered by HMOs.
VA	§ 38.2-3411.1 Reg. 28 § 10 (HMOs)	Mandated offer of health supervision coverage through age 6. Not subject to coinsurance and deductibles. Well child care is a part of basic health care services required to be provided by HMO.

STATE	CITATION	SUMMARY
WV	§§ 33-15-15 (indiv); 33-16-12 (group); 33-16A-15 (group conversation); 33-25A-8c (HMOs)	Child immunizations covered without coinsurance or deductible.

MANDATED BENEFITS:
IN VITRO FERTILIZATION

STATE	CITATION	SUMMARY
AR	§§ 23-85-137 (indiv.); 23-86-118 (group)	Requires all disability insurers to include in vitro fertilization as a covered expense.
	Regulation 1	Sets minimum and maximum benefit levels; sets standards and guidelines for determining if policy must include in vitro fertilization coverage.
CA	§§ 10119.6 (insurers); 11512.28 (nonprofits)	Mandated offering of coverage for infertility treatment other than in vitro fertilization.
CT	§ 38a-536 (group)	Mandated offering to groups; coverage for necessary treatments for infertility including in vitro fertilization procedures.
HI	§§ 431, 433	Provides one-time only benefit for outpatient in vitro fertilization expenses; sets forth conditions for coverage; applies to all individual and group health policies and hospital or medical service plan contracts.

STATE	CITATION	SUMMARY
IL	215 ILCS 5/356m (group)	Group policies that cover pregnancy-related care must also cover infertility services, including in vitro fertilization.
MD	48A § 354DD (nonprofit health service plans); 48A § 470W (hospital or major medical coverage); 48A § 477EE (group/blanket coverage)	Provides that a health insurance policy issued on an expense-incurred basis that provide pregnancy-related benefits cannot exclude outpatient benefits for all outpatient expenses arising from in vitro fertilization procedures, lists conditions for coverage; applies to all policies covering residents who work within the state.
TX	art. 3.51-6 (1987)	All insurers, including HMOs and self-insurers, that provide hospital surgical and medical insurance with pregnancy-related benefits shall provide benefits, on an expense-incurred basis, for in vitro fertilization subject to certain conditions.

MANDATED BENEFITS:
RECONSTRUCTIVE SURGERY

STATE	CITATION	COVERAGE
AR	§ 20-1402 (group)	If cover mastectomy, cover reconstructive surgery incidental to covered mastectomy.
CA	§§ 10123.8 (group); 10123.82	If cover mastectomy, cover prosthesis or reconstructive surgery to restore symmetry.
CT	§§ 38a-503 (indiv.); 38a-542 (group)	If cover removal of tumors, cover reconstructive surgery or prosthesis. Must include reconstructive surgery on breast on which mastectomy was performed and reconstructive surgery on nondiseased breast to produce a symmetrical appearance.
FL	§ 627.6417 (indiv.); § 627.6612 (group)	Must provide coverage for prosthetic devices and breast reconstructive surgery incident to a mastectomy, including to reestablish symmetry between the two breasts.
IL	215 ILCS 5/356g	If cover mastectomy, cover prosthetic device or reconstructive surgery incidental to mastectomy.

STATE	CITATION	COVERAGE
LA	§ 22:215.18	If cover mastectomy surgery, must provide coverage for reconstruction of the breast on which surgery was performed and reconstruction of the other breast to produce a symmetrical appearance. Applies to policies issued on or after 1/1/98.
ME	24-A § 2731-A 24-A § 2745-C (indiv.); 24-A § 2837-C (group); 24-A § 4237 (HMOs; 24-A § 2320-C (nonprofits)	Mastectomy defined to include surgery to reconstruct breast on which surgery has been performed. Must include coverage of construction of both breasts to produce symmetrical appearance.
MD	48A § 490FF	All insurers, including HMOs, shall provide coverage for reconstructive breast surgery resulting from mastectomy. Shall include reconstructive surgery on nondiseased breast to achieve symmetry.

STATE	CITATION	COVERAGE
MI	§§ 500.3406a; 500.1415 (nonprofits); 500.3613 (group)	Reasonable charges for medical care and reconstructive surgery shall be covered.
MN	§ 62A.25	Cover reconstructive surgery following surgery or illness of the involved part.
MO	§§ 376.1209	If cover mastectomy, must provide coverage for prosthetic device or reconstructive surgery necessary to restore symmetry.
NV	§§ 689A.041 (indiv.); 689B.0375 (group); 695B.191 (nonprofits)	Cover reconstructive breast surgery if cover mastectomy; includes surgery on one or both breasts to reestablish symmetry.
NH	§ 417-D:2-b	If insurer covers mastectomy surgery, must also cover reconstruction of the breast on which surgery has been performed and surgery and reconstruction of the other breast to produce a symmetrical appearance.

STATE	CITATION	COVERAGE
NJ	§§ 17B:27-46.1a (group); 17:48-6b (hospital serv. corp.); 17B:26-2.1a (indiv.); 17:48A-7b (med. serv. corp); 17:48E-35 (health service corp.)	Following mastectomy, must cover reconstructive surgery, including surgery to restore and achieve symmetry and costs of prostheses or radiation then also cover cost of chemotherapy in connection with treatment of breast cancer.
NY	§ 3216(i)(20)	All comprehensive policies must include coverage for reconstructive breast surgery resulting from mastectomy. Shall include reconstructive surgery on nondiseased breast to achieve symmetry.
NC	§§ 58-51-61, 58-65-96, 58-67-79	Eff. 1/1/98 every policy issued or renewed that covers mastectomy must provide coverage for reconstructive breast surgery resulting from a mastectomy. Must include surgery on non-diseased breast to achieve symmetry.
PA	§ 40-39-125	A health policy covering a mastectomy must also include coverage for prosthetic devices and reconstructive surgery incident to the mastectomy, subject to usual coinsurance and deductibles. Coverage may be limited to surgical procedures performed within six years of the mastectomy.

STATE	CITATION	COVERAGE
RI	§§ 27-18-39 (ind. or group); 27-19-34 (nonprofits); 27-20-21 (nonprofits); 27-41-43 (HMOs)	Coverage for mastectomy shall include coverage for prosthetic devices and reconstructive surgery to restore symmetry. Reconstructive surgery must be performed within 18 months of the original mastectomy.
TN	HB 697 (1997)	A group or individual policy that covers mastectomy surgery must also provide for reconstructive breast surgery on diseased breast as well as any surgical procedure on non-diseased breast to achieve symmetry.
TX	§ 21.53D	If cover mastectomy, must cover reconstruction but may be subject to same deductible and copay as mastectomy.
WA	§§ 48.20.395; 48.21.230 (group)	Cover reconstructive breast surgery resulting from mastectomy, including breast reduction of nondiseased breast to make it equal in size after reconstructive surgery on diseased breast is performed.
WI	§ 632.895 (13)	If cover mastectomy, provide coverage for breast reconstruction of the affected tissue.

MANDATED BENEFITS:
TEMPOROMANDIBULAR JOINT DISORDERS (TMJ)

STATE	CITATION	SUMMARY
AR	Bulletin 11-84	TMJ treated as any other illness or injury and not considered dental work.
GA	§§ 33-29-20 (indiv.); 33-30-14 (group)	May not exclude treatment by physicians or dentists.
KY	§ 304.17-319	Cover all bones and joints if policy covers any.
MN	§ 62A.043	Policies other than specified disease policies must specifically provide coverage for TMJ and craniomandibular disorder.
MS	§ 83-9-45	Must offer coverage, same level as for any other joint in the body.
NV	§§ 689.A.0465; 689B.0739 (group); 695B.1931 (nonprofits); 695C.1755 (HMOs)	Health policy shall cover the temporomandibular joint.

STATE	CITATION	SUMMARY
NM	§ 59A-16-13.1	Policies other than specified disease policies must specifically provide coverage for TMJ and craniomandibular disorder.
NC	11 NCAC 12.0552 § 58-3-121	Policies providing surgical, medical and in-hospital benefits may not exclude coverage for TMJ caused by disease or accident, prosthesis placed directly on teeth may be excluded. If pay for any procedures involving bones or joints, may not exclude same coverage for procedures involving bones and joints of face.
ND	§ 26.1-36.09.3	Mandates coverage for TMJ and craniomandibular disorder; $10,000 maximum for surgery, $2500 maximum for non-surgical treatment.
TX	art. 21.53A	If provide coverage for treatment of skeletal joints, provide comparable benefits for TMJ.
VT	Bulletin 63	All insurers writing health insurance will honor claims for treatment of temporomandibular joint syndrome.
VA	§ 38.2-3418.2	If provide coverage for treatment of skeletal joints, provide comparable benefits for TMJ.

STATE	CITATION	SUMMARY
WA	§§ 48.21.320 (group); 48.33.460 (nonprofits); 48.46.530 (HMOs)	Optional coverage for TMJ disorders.
WI	§ 632.895 (11)	Required coverage for TMJ disorders.
WV	§ 33-16-3f; Reg. 114-29	Mandated offering of coverage for temporomandibular disorders and craniomandibular disorders. May decline coverage by written waiver.

MANDATED BENEFITS:
MISCELLANEOUS MANDATES:

STATE	CITATION	SUMMARY
	ALZHEIMER'S	
MD	48A § 477GG (group); 48A § 354FF (nonprofits)	Mandated offering of coverage for care of Alzheimer's, including nursing home care.
	AUTISM	
CO	§ 10-16-104.5	Autism is not a mental illness; cover same as any other sickness.
NH	§ 417-E:1	Cover "biologically based" mental illness, including autism, same as any other type of physical illness.
	OFF-LABEL DRUG USE	
MA	ch.175:47O to 175:47P; 176B:4P (nonprofits); 176G:4G (HMOs)	Off-label drugs for AIDS treatment must be covered.

STATE	CITATION	SUMMARY
	WIGS	
MN	§ 62A.28	Scalp hair prosthesis for hair loss suffered because of alopecia areata.
NH	§ 415:18-d (group)	Scalp hair prosthesis for hair loss suffered because of alopecia areata, alopecia totalis or permanent loss due to injury. Need statement from doctor that medical necessity.

This chart does not constitute a formal legal opinion by the NAIC staff on the provisions of state law and should not be relied upon as such. Every effort has been made to provide correct and accurate summaries to assist the reader in targeting useful information. For further details, the statutes and regulations cited should be consulted.

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No. 97-2063

IN THE
Supreme Court of the United States
October Term, 1997

STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

THE HONORABLE JOHN SPERONI,
TAMMY SNIDER AND MICHAEL AVERY,

Respondents.

On Petition for a Writ of Certiorari
to the Illinois Supreme Court

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Chamber of Commerce of the United States of America ("the Chamber") respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of petitioner, pursuant to Rule 37.3 of the rules of this Court. Consent to the filing of this brief *amicus curiae* has been received from counsel for Petitioner and counsel for Respondents Tammy Snider and Michael Avery. However, Respondent The Honorable John Speroni has indicated that he takes no

position as to whether to grant consent to the filing of this brief *amicus curiae*, which has necessitated this motion.

The Chamber is the world's largest business federation. With substantial membership in each of the fifty States, the Chamber represents an underlying membership of more than three million businesses and professional organizations of every size, in every sector of business and in every region of the country. The Chamber thus serves as the principal voice of the American business community. An important function of the Chamber is to represent the interests of its members as *amicus curiae* in cases addressing issues of national concern to the American business community. The Chamber has sought to advance those interests by filing *amicus curiae* briefs in numerous cases addressing issues of class certification, including *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231 (1997) and *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996). Additionally, the Chamber has also testified in Congress on the issue of state court class action abuses. Stateside Associates, *Class Actions in State Courts: A Report on Alabama* (Feb. 26, 1998) (attached to *Class Action Jurisdiction Act of 1998: Hearings on H.R. 3789 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. (Mar 5, 1998) (statement of Dr. John B. Hendricks on behalf of the United States Chamber of Commerce) available in 1998 WL 122544).

The Chamber's membership is composed of businesses that are particularly vulnerable to class action litigation. Chamber members have been targets in some of the nation's most publicized class action lawsuits, which have asserted claims in a wide variety of contexts, including consumer protection, securities, product liability, tort and antitrust. The Chamber and its members believe that state as well as federal courts should rigorously adhere to rules and procedures governing class actions, and maintain those due process

protections to defendants articulated by this Court in the class action context.

The Chamber believes that the overly expansive class certified by the Illinois circuit court and the court's order foregoing the requirement of providing actual notice to identifiable class members are fundamentally at odds with decisions of this Court imposing due process limitations on the certification of class actions and the requirements of proper notice to class members. If other state courts attempt to exert their power upon sister states with respect to transactions wholly occuring in those states, as the Illinois circuit court has done in this case, Chamber members would be placed in the untenable position of choosing between two competing bodies of law.

The Chamber seeks to appear as *amicus curiae* to stress how the Illinois circuit court's certification and notice orders are part of a disturbing trend of unfounded class action litigation, which is adversely affecting the competitive vitality of American business. Lawsuits alleging consumer fraud, as in this case, are all too often "lawyer driven" actions brought in order to generate enormous legal fees, rather than provide any real substantive benefit to putative class members. Indeed, class actions of dubious merit lead to an unwarranted redistribution of societal resources from American businesses, their shareholders and employees, to class action lawyers.

The Chamber can assist the Court by providing a broader perspective to the issues in this case, as well as a fuller discussion of the significance of a nationwide class certification decision that disregards the due process rights of corporate defendants. Accordingly, the Chamber respectfully requests that it be allowed to participate in this case and to file the

accompanying brief *amicus curiae* in support of petitioner.

Respectfully submitted,

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The interest of *amicus curiae* The Chamber of Commerce of the United States of America ("the Chamber") is set forth in the motion accompanying this brief.

SUMMARY OF ARGUMENT

This case squarely presents a troubling example of an increasingly recurring trend that is of great significance to the Chamber's member businesses -- the misuse of the class action device in certain state courts as a means of trampling corporate defendants' due process rights and coercing unfair settlements from defendants who lack any realistic opportunity to defend themselves properly once certification is granted.[1] The certification and notice orders of the Illinois circuit court embody many of the most systemic and recurring abuses in current state court class action practice, and are irreconcilable with decisions of this Court setting due process limitations regarding the scope of class certifications and notice to class members. The circuit court's decisions infringe on the due process rights of State Farm as well as absent class members, impede interstate commerce and violate principles of federalism designed to preserve the sovereignty of Illinois' sister states.

As is all too common in Illinois and a number of other states, the original class was conditionally certified *ex parte*, within hours of the filing of the complaint, before the defendant had been served or even heard about the action. The small county court in which this case was filed, without any real nexus to the underlying dispute, subsequently held a pro forma

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[1] Counsel for the Chamber authored this brief in its entirety. No person or entity, other than the Chamber, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

certification hearing and finalized the certification of this 48-state class action. Indeed, this class was certified despite the fact that the insurance statutes and regulations of numerous states either expressly permit or even require the use of parts manufactured by sources other than the original equipment manufacturer ("non-OEM parts"). The circuit court then compounded its constitutional errors by failing to require class notice by mail to the significant percentage of putative class members whose names and addresses were readily available, in clear violation of the procedural due process rights of State Farm as well as the absent class members. *See, e.g., Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 795-97 (1983); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950).

This Court should review the certification and notice orders of the Illinois circuit court despite their interlocutory nature. As courts have noted, in large nationwide class actions the pressure on defendants to settle once a case is certified is enormous and often insurmountable, which effectively precludes any post-judgment judicial review of an erroneous certification decision. *See In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir.), *cert. denied*, 516 U.S. 867 (1995).

This case presents the Court with an excellent opportunity to redress the underlying constitutional flaws in the certification and notice orders of the Illinois circuit court that are typical of nationwide class actions being erroneously certified by a number of state courts. In particular, the certification order of the Illinois circuit court cannot be reconciled with the constitutional jurisprudence of this Court, which prevents state courts from applying the forum's law to transactions that wholly occurred in other States, and as to which the forum state lacks any significant interest. *See, e.g., BMW of N. Am. Inc. v. Gore*, 517 U.S. 559, 571-73 (1996); *Phillips*

Petroleum Co. v. Shutts, 472 U.S. 797, 818-23 (1985). The circuit court's finding that it could apply the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 Ill. Comp. Stat. 505/1 (West 1998) (the "ICFA"), to the claims of all class members living throughout almost the entire country violates this due process constraint.

At the same time, an immediate review of the trial court's ruling authorizing notice to class members by publication only, despite the fact that a significant percentage of the putative class could be actually identified, is necessary in order to prevent absent class members from later arguing that they are not bound by any judgment reached in this case because of inadequate notice. *See Shutts*, 472 U.S. at 805. Accordingly, this case presents an excellent opportunity for the Court to provide much needed guidance as to the due process mandates governing the certification and notice requirements for class actions in state courts, particularly in nationwide class actions, and to rein in the abuses of the class action device increasingly occurring in state courts around the country.

ARGUMENT

I. THE CIRCUIT COURT'S CERTIFICATION AND NOTICE ORDERS RAISE RECURRING DUE PROCESS ISSUES AT THE CORE OF THE PROBLEM OF STATE COURT CLASS ACTION ABUSE THAT NECESSITATE IMMEDIATE GUIDANCE FROM THIS COURT

A. The Abuse of the Class Action Device in State Courts is a Growing Problem That Requires the Intervention of this Court to Preserve the Due Process Rights of Defendants and Absent Class Members

In recent years, corporate defendants have been besieged by an ever increasing number of putative class actions

filed in state, as well as federal, courts. As noted by the Honorable Paul V. Niemeyer, Chairman of the Advisory Committee on Civil Rules of the Judicial Conference, "the adjudication of mass torts and the use of class actions is transforming the litigation landscape. Class actions are being certified at unprecedented rates, and they are involving a substantial, if not a majority, of all American citizens." *Hearings on Class Action Lawsuits Before the Subcomm. on Administrative Oversight and the Courts of the Senate Comm. on the Judiciary,* 105th Cong. (Oct.30, 1997) statement of Paul V. Neimeyer, United States Circuit Judge, Court of Appeals for the Fourth Circuit, available at 1997 WL 680300.[2]

As federal courts have recently demonstrated an increasing and well-founded skepticism toward the certification of nationwide class actions asserting state law claims,[3] the

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[2] In discussing the testimony presented before the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23 at three public hearings, Judge Niemeyer noted in a memorandum to the members of the Advisory Committee that "one witness stated that his company's exposure to class actions has increased 300% in the last three years; another stated 400-500% in the last two years; another, 500-1000% in the last three years; and yet another 300-400% in the last three years. One financial institution's counsel stated that his company was involved in 65 class actions in 1996 alone." 1 *Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23* at x (May 1, 1997) (hereinafter "*Advisory Committee Working Papers*").

[3] *See, e.g., Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom. Amchem Products, Inc. v. Windsor*, 117 S.Ct. 2231 (1997); *Andrews v. American Tel. & Tel.*

(continued...)

"battleground" has largely shifted to state courts. Indeed, much anecdotal evidence confirms that the number of state court class actions has skyrocketed in recent years. For example, a recent study sponsored by the RAND Institute for Civil Justice reports a "doubling or tripling of the number of putative class actions" over the past several years, with the growth "concentrated in the state courts, as plaintiffs and defendants both see increased unwillingness among federal judges to certify or to sustain certification of class actions." Deborah Hensler et al., *Preliminary Results of the RAND Study of Class Action Litigation* 15 (1997); *see* also Minutes, Advisory Committee on Civil Rules, Nov. 9 and 10, 1995, at 15 ("There has been an explosion in state class actions. Many of them involve claims that are framed as 'fraud' claims arising out of the terms of various kinds of insurance and loan transactions. The volume is remarkable."), *reprinted in* 1 *Advisory Committee Working Papers* 244; Draft Minutes, Civil Rules Advisory Committee, Oct. 17 and 18, 1996, at 6 ("Plaintiffs are moving more and more to state courts, particularly in the wake of the Supreme Court decision [in *Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873 (1996)] that seems to entrench the full-faith-and-credit effects of state class-action judgments."), *reprinted in* 1 *Advisory Committee Working Papers* at 295.

The onslaught of class actions in state courts is directly attributable to the fact that certain state court judges will simply acquiesce to requests by plaintiffs' lawyers for nationwide class certification, despite the fact that these expansive national

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[3] (...continued)
Co., 95 F.3d 1014 (11th Cir. 1996); *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *In re American Med. Sys., Inc.*, 75 F.3d 1069 (6th Cir. 1996); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir.), *cert. denied*, 516 U. S. 867 (1995).

classes all too often eviscerate the due process rights of defendants and absent class members, ignore state class action procedural rules and impede the sovereign rights of sister states to adjudicate their own disputes.

A recent study of state court class action filings in six small rural Alabama counties conducted by Stateside Associates, which researches state government issues, produced some startling findings as to the breadth of class action abuses in one representative State (the "Stateside Associates Report"). The Stateside Associates Report concludes that in the 1995-1997 period, the number of filed class actions increased dramatically (91 in the six surveyed counties) and now comprises a disproportionately large percentage of the dockets of some of the county courts surveyed (nearly 10% in one example). Stateside Associates, *Class Actions in State Courts: A Report on Alabama* (Feb. 26, 1998) (attached to *Class Action Jurisdiction Act of 1998: Hearings on H.R. 3789 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. (Mar 5, 1998) (statement of Dr. John B. Hendricks on behalf of the United States Chamber of Commerce) available in 1998 WL 122544 (the "Hendricks Statement")). The Stateside Associates Report further notes that these class actions are typically targeted against major multinational corporations based outside of Alabama on behalf of a putative multi-state or nationwide class, and that the classes are almost always certified.[4]

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[4] Confirming the view that some state court judges have never seen a class action they did not like, the Stateside Associates Report notes that one Alabama circuit judge has not denied a request for certification in the last three years, and granted motions to certify in 30 cases in 1996 and 1997 alone. In contrast, in 1997 all 900 federal district court judges in the

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The state courts in which certification abuse is most rampant are those jurisdictions that have been carefully chosen by plaintiffs' attorneys because of their willingness, and even eagerness, to certify classes that federal courts are increasingly unwilling to certify. Because there is no mechanism in state courts to consolidate competing state court class actions comparable to the federal multi-district litigation transfer process, defendants are often forced to defend multiple putative state court nationwide class action lawsuits alleging the same factual allegations, and making the same claims on behalf of the same putative class members. These competing and often directly overlapping state court class actions are always subject to a risk of inconsistent results. As a result, the same putative class members and their lawyers often have several bites at the apple in various states to attempt to have a class action certified.

As this case amply demonstrates, forum shopping by the plaintiffs' attorneys – a factor that should have no bearing on how the constitutional requirements of class action litigation are being applied – can be the single most important factor in determining whether a class will be certified, as well as the scope of that certification. Indeed, the certification decision by the Illinois circuit court presents a compelling and particularly egregious example of a 48-state class action based solely on state law claims, where several federal and state courts have refused to certify even a single statewide class raising the same allegations certified in this case, because of, among other things, the lack of predominance of common issues. *See*

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[4] (...continued)
United States certified a total of only 38 class actions, as identified through computerized legal research data bases, excluding cases against the government and discrimination class actions. *See* Hendricks Statement at 4-5.

Murray v. State Farm Mut. Auto. Ins. Co., No. 96-2585-M1/A (W.D. Tenn. Aug. 19, 1997); *Rios v. Allstate Ins. Co.*, No. 94 CH 11396 (Cook County Cir. Ct. Jan. 27, 1998); *see also* *Moorhead v. State Farm Mut. Auto. Ins. Co.*, No. 95-AR-0668-S, Order at 6 (N.D. Ala. Sept. 12, 1997) (refusing to certify class because of inadequacy of class representatives, but expressing doubt as to whether the class claims satisfied the commonality requirement) *cited in* Petition at 18.

Moreover, the circuit court's holding in this case that the ICFA could be applied to the entire 48-state class, *see Pet. App.* at 11a, is directly contradicted by Illinois federal courts applying the ICFA. In *Rohlfing v. Manor Care, Inc.*, 172 F.R.D. 330 (N.D. Ill. 1997), the court denied a motion to certify a class of Illinois residents as well as non-residents raising a claim under the ICFA for allegedly excessive fees for pharmaceutical prescriptions. The court held that the ICFA could not be applied to the plaintiff class as a whole, because there was "virtually no connection to Illinois for those plaintiffs who are not Illinois residents. . . . On these facts, *where the only connection with Illinois is the headquarters of one defendant*, we conclude that the ICFA does not apply to the claims of the non-Illinois plaintiffs. . . ." 172 F.R.D. at 339-40 (emphasis added). As a result, because the ICFA applied to only a small subset of the proposed class, the court held that common issues did not predominate, and declined to certify a nationwide class with respect to this claim. *See id. at 340.*[5] Indeed, federal

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[5] In contrast, the circuit court's reliance on *Martin v. Heinold Commodities, Inc.*, 510 N.E.2d 840 (Ill. 1987) in authorizing the application of the ICFA in this case simply because the defendant was headquartered in Illinois is completely misplaced. In *Martin*, unlike the present case, the contracts containing the allegedly deceptive statements were all

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courts in Illinois have refused to certify nationwide class actions where the consumer fraud statutes of other states may be applicable, on the grounds that there are variations in those laws, including "differing standards of proof, procedure, substance, and remedies" that may be applicable. *Tylka v. Gerber Prods. Co.*, No. 96 C 1647, 1998 WL 93277, at *4 (N.D. Ill. Mar. 3, 1998); *see also Fisher v. Bristol-Myers Squibb Co.*, No. 97 C 5983, 1998 WL 299798 (N.D. Ill. May 28, 1998) (refusing to certify a nationwide class limited to consumer fraud liability questions); *Laughman v. Wells Fargo Leasing Corp.*, No. 96 C 925, 1997 WL 567800 (N.D. Ill. Sept. 2, 1997) (nationwide class certification denied where, *inter alia*, the impact of variations in state consumer fraud laws on the significance of uncommon fact questions was not demonstrated).

The Illinois circuit court's broad certification order in this case contrasts sharply with those decisions refusing to certify comparable classes governing the same alleged conduct or causes of action, and demonstrates the growing split between state and federal courts regarding the appropriate due process limitations on the certification of nationwide class actions. Only this Court can clarify the scope of the constitutional constraints on the certification of multi-state class actions,

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[5] (...continued)
executed in Illinois, and all contained express choice of law and forum selection clauses specifying that any litigation would be conducted in Illinois, pursuant to Illinois law 510 N.E.2d at 847. In addition, the contracts provided that all payments were to be remitted and all complaints referred to the defendant's Illinois headquarters. *Id.* Nothing in *Martin* suggests that Illinois law could properly be applied to an out-of-state transaction that lacked any of these features, simply on the grounds that the defendant maintains its corporate headquarters in Illinois.

which would provide greater consistency between certification decisions in state and federal courts, and would inhibit the blatant forum shopping that the present system fosters, and which the present case so forcefully demonstrates.

B. The Pressure to Settle Certified Nationwide Class Actions Necessitates the Interlocutory Review of the Certification Order by this Court to Preserve the Defendant's Due Process Rights

The Court should act now to review the class certification order in this case despite its interlocutory nature, because in such a massive putative class action, a certification order creates enormous pressure on a defendant to settle, irrespective of the merits of the claims or the strength of the defenses. Class actions are unique in our judicial system in that as a practical matter, a certification decision effectively determines the outcome of the case, and coerces a defendant into giving up its right to a trial on the merits. Once a case is certified, particularly a nationwide class action involving millions of class members, the experience of the Chamber's members is that they are generally unwilling to go to trial in light of the extraordinary financial risk to their companies if an adverse verdict were entered on the certified common issues. As a result, the propriety of the certification decision is almost never reviewable after a final judgment is entered. Only an interlocutory challenge to a certification order is possible, which in state court generally requires a writ of mandamus or prohibition, a formidable standard that, as in this case, appellate courts only rarely find satisfied.[6]

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[6] In this case, when State Farm initially petitioned for a writ of mandamus and/or prohibition or, in the alternative, for a supervisory order, contending, *inter alia*, that the certifica-

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As explained by the Fifth Circuit panel in *Castano v. American Tobacco Co.*, "[c]lass certification magnifies and strengthens the number of unmeritorious claims. Aggregation of claims also makes it more likely that a defendant will be found liable and results in significantly higher damage awards." 84 F.3d at 746 (citation omitted). Moreover, certification "creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low. These settlements have been referred to as judicial blackmail." *Id.; see also Rhone-Poulenc*, 51 F.3d at 1298 (noting that defendants facing potential class liability in the billions of dollars "may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle.").[7] As noted by William T. Coleman,

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[6] (...continued)
tion order violated State Farm's due process rights and infringed the sovereignty of Illinois' sister States, the Illinois Supreme Court issued an order stating that there were insufficient votes either to grant or to deny the petition. *See* Petition at 7. After the circuit court amended the definition of the class and adopted class counsel's notice plan, State Farm again moved for a writ of mandamus and/or prohibition or, in the alternative, for a supervisory order, which was denied without comment on March 24, 1998. *See Pet. App.* at 1a.

[7] A 1996 study of class actions in four federal district courts published by the Federal Judicial Center at the request of the Advisory Committee on Civil Rules supports the conclusion that certification compels defendants to settle. The Report states that "certified class actions were more than two times more likely to settle than cases that contained class allegations but were never certified." Thomas E. Willging et al., (continued...)

Jr., a member of the Advisory Committee on Civil Rules at the time Rule 23 was amended in 1966, in discussing the pressures imposed by claims with little likelihood of success but involving multi-million member classes:

> No right-minded general counsel can turn a blind eye to that kind of financial risk. Thus, even where the claims involved are utterly without merit, Rule 23 hands counsel a fully loaded gun with which to press corporate defendants and individuals with deep pockets unfairly. In case after case, defendants are being forced into settlements driven not by what suits the best interests of the putative class members, but rather by what enhances the financial interests of class counsel.

Statement of William T. Coleman, Jr., on the Proposed Amendments to Fed. R. Civ. P. 23 Before the Advisory Committee on Civil Rules, *reprinted in* 4 *Advisory Committee Working Papers* at 452.

Although Federal circuit courts are generally reluctant to grant a writ of mandamus to review the decision of a district court, mandamus has been granted to decertify classes, where the party seeking the writ had no other adequate means to correct the lower court's clear abuse of discretion. *See, e.g., In re American Med. Sys., Inc.*, 75 F.3d 1069, 1078-90 (6th Cir. 1996); *Rhone-Poulenc* 51 F.3d at 1295; *In re Fibreboard Corp.*, 893 F.2d 706, 709-12 (5th Cir. 1990); *In re Bendectin*

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[7] (...continued)
Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules (1996), *reprinted in* 1 *Advisory Committee Working Papers*, App. B, at 62.

Prods. Liab. Litig., 749 F.2d 300, 302-07 (6th Cir. 1984); *see also* Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999 (11th Cir. 1997) (granting writ to decertify putative class of customers who were allegedly discriminated against as well as order allowing nationwide advertising and mass mailings prior to certification).

The proposed amendment to Fed. R. Civ. P. 23 to add subdivision (f) would give federal courts of appeals discretionary power to hear appeals from an order granting or denying class certification, without the necessity of applying the requirements of 28 U.S.C. § 1292(b) or the strict standards for mandamus review. The Committee Note accompanying this proposed amendment recognizes that an interlocutory review of certification decisions is desirable because "[a]n order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." Proposed Amendments to the Federal Rules of Civil Procedure, *reprinted in 1 Advisory Committee Working Papers* 157.

However, this proposed amendment to Rule 23 would not apply to class action practice in state courts in Illinois or other states, and parties seeking to challenge the propriety of a certification order are generally left to the rarely granted remedy of a writ of mandamus or prohibition. Because a trial of the purportedly common issues identified by the circuit court in this case is unlikely ever to occur, given the inexorable pressure faced by defendants to settle nationwide class actions with millions of putative class members, granting certiorari where there is an interlocutory decision is the only means by which this Court may effectively review the fundamental and recurring due process violations evidenced in this case.

II. THE CERTIFICATION ORDER CONFLICTS WITH DECISIONS OF THIS COURT IMPOSING CONSTITUTIONAL LIMITATIONS ON THE APPLICATION OF A FORUM STATE'S LAW TO TRANSACTIONS WHOLLY OCCURRING OUTSIDE THE STATE

In a variety of contexts, this Court has definitively rejected efforts on the part of state courts to apply local laws to transactions occurring entirely in other states. For example, in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), this Court held that the State of Alabama could not punish defendant BMW under Alabama's law of fraud for vehicle repairs that had no connection to that State. This Court noted that states could not dictate the policy choices of other states, and held that under principles of state sovereignty, Alabama could not punish defendant BMW for conduct that was lawful in other states. 517 U.S. at 571-72. This Court held:

> [B]y attempting to alter BMW's nationwide policy, Alabama would be infringing on the policy choices of other States. . . . Alabama may insist that BMW adhere to a particular disclosure policy in that State. Alabama does not have the power, however, to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents. Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions.

Id. at 572-73 (footnote omitted). This Court further noted that "[s]tate power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute." *Id.* at 572 n.17 (citing *New York Times v. Sullivan*, 376 U.S. 254, 265 (1964)). *See also Geressy v. Digital Equip. Corp.*, 950 F.

Supp. 519, 521 (E.D.N.Y. 1997) (applying *Gore* in noting that "judicial development of state law can only be directed at activity within the state").

The Illinois circuit court's certification decision is irreconcilable with *Gore*, because the court's decision to apply Illinois substantive law improperly overrides the policy decisions of the 47 other States subject to the class definition, many of which have statutes or regulations that specifically authorize the use of non-OEM parts. Indeed, Massachusetts requires the use of non-OEM parts except in certain limited circumstances, Mass. Regs. Code tit. 211, § 133.04 (1996), and Hawaii requires insureds to pay the price differential if they insist on receiving OEM parts. Haw. Rev. Stat. Ann. § 431:10C-313.6(a) (Michie 1997).[8] Each state has its own policy preferences with respect to the use of non-OEM parts, and any attempt by the Illinois circuit court to compel a nationwide prohibition on the use of such parts improperly intrudes on the sovereignty of Illinois' sister states and violates the mandate of *Gore*. *Cf. Gore*, 517 U.S. at 569-70 (noting the patchwork of rules governing automobile repair disclosure, "representing the diverse policy judgments of lawmakers in 50 States").

It is unfathomable and unjust for an Illinois court, upon entry of a judgment in this case, including the requested injunctive relief, to require State Farm to make a Hobson's choice between facing contempt proceedings in the Illinois court for continuing to use non-OEM parts in Massachusetts, or liability in Massachusetts for failing to carry out that state's statutory mandate in specifying non-OEM parts. This consti-

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[8] The Court is referred to the Petition at 12-13 n.7 for a complete listing of state laws and regulations governing the use of non-OEM parts.

tutes a wholly unacceptable burden on interstate commerce. *See, e.g., Healy v. Beer Inst.*, 491 U.S. 324, 337 (1989) (the Commerce Clause "protects against inconsistent legislation arising from the projection of one state['s] regulatory regime into the jurisdiction of another State"); *Edgar v. MITE Corp.*, 457 U.S. 624, 641-43 (1982) (plurality op.) (Illinois' anti-takeover statute impermissibly regulated transactions occurring entirely outside of Illinois, even though it was being applied to a tender offer for an Illinois corporation); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529-30 (1959). Under the Commerce Clause, Illinois simply has no right to tell other states how they should conduct business in their states, and cannot constitutionally impose sanctions that would restrict interstate commerce. *See Healy*, 491 U.S. at 336 ("The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.").

Similarly, the circuit court's application of Illinois law to the claims of class members with no connection to the forum state directly violates this Court's holding in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). In *Shutts*, this Court noted that the forum state, in that case Kansas, could not "take a transaction with little or no relationship to the forum and apply the law of the forum in order to satisfy the procedural requirement that there be a 'common question of law.'" 472 U.S. at 821. The forum state "must have a 'significant contact or significant aggregation of contacts' to the claims asserted by each member of the plaintiff class, contacts 'creating state interests,' in order to ensure that the choice of Kansas law is not arbitrary or unfair." *Id.* at 821-22 (citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981)). Neither the Due Process Clause nor the Full Faith and Credit Clause allow Kansas to "'abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them.'" *Id.* at 822 (*quoting Home Ins. Co. v. Dick*, 281 U.S. 397, 410 (1930)).

As in *Shutts*, Illinois has no legitimate interest in determining whether State Farm may specify the use of non-OEM repair parts on vehicles owned by residents of states other than Illinois, in accordance with insurance policy language reviewed and approved by the insurance regulators of that State. Similarly, in violation of the mandate of *Shutts*, there could be no reasonable expectation on the part of either State Farm or its policyholders in states other than Illinois that Illinois' consumer fraud law would govern any disputes between them. 472 U.S. at 822. As a result, the circuit court's application of the ICFA to the claims of every class member, irrespective of the State where they purchased their State Farm policy and/or entered into a repair transaction, merely to facilitate litigation of this case as a class action, is arbitrary and unfair, and a gross violation of due process.

Moreover, the circuit court's decision to apply the ICFA to the claims of all class members fails to take into account the significant variations in the consumer fraud laws of the various states, many of which, unlike in Illinois, do not encompass claims arising out of insurance contracts. *See* Petition at 12 n.7. As recently noted by the Northern District of Illinois in *Fisher v. Bristol-Myers Squibb Co., No. 97 C 5983,* 1998 WL 299798 (N.D. Ill. May 28, 1998), there are "troublesome variations" in the consumer fraud laws of the 50 states that cause "serious reservations about certifying a nationwide class." 1998 WL 299798, at *6. In *Fisher*, contrary to the present case, the court refused to certify a nationwide class limited to consumer fraud liability questions because a class action would not be a superior method of resolving the controversy in that case as to whether a prescription drug caused harm. *Id.* at *9. *See also In re Stucco Litig.*, 175 F.R.D. 210, 217 (E.D.N.C. 1997) (denying certification of a nationwide class because differences among the States' consumer fraud

statutes as well as differences in other applicable laws rendered the class action unmanageable).

As a result, this Court should grant certiorari to reemphasize that the law of the defendant's domicile may not be constitutionally applied to transactions wholly occurring outside of that state.

III. THE CIRCUIT COURT'S NOTICE ORDER IS IRRECONCILIABLE WITH DECISIONS OF THIS COURT REQUIRING THAT ACTUAL NOTICE BE PROVIDED TO IDENTIFIABLE CLASS MEMBERS

This Court has stated that as a matter of due process, when the names and addresses of putative class members may be readily identifiable, those persons must be afforded actual notice, either through personal or mail service. *See, e.g., Tulsa Prof'l Collection Servs, Inc. v. Pope*, 485 U.S. 478, 484-85 (1988); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 795-97 (1983); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974). In these circumstances, relying merely on publication notice is constitutionally inadequate in apprising these parties of the existence of the proceeding that will affect their rights. In *Eisen*, the Court held that "[i]ndividual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort." 417 U.S. at 173. Similarly, in *Shutts*, a state court class action, the Court held that the Kansas notice procedure satisfied due process, where a fully descriptive class notice was sent by first class mail to each class member, with the opportunity to "opt out" of the class. 472 U.S. at 812.

As a result of these holdings, the circuit court's ruling that class counsel could rely on publication notice, and not provide actual notice to the 1.8 million policyholders whose names and addresses could be identified from State Farm's

computerized database, violates due process and is irreconcilable with this Court's decisions in *Eisen* and *Shutts*. The facts relied on by the circuit court -- that mailed notice would be no more effective than notice by publication, and that a certain number of the policyholders would certainly have changed their addresses -- simply do not obviate the need for actual notice to at least the substantial percentage of the putative class members that could be identified by such means.[9] *See Eisen*, 417 U.S. at 175 (notice by publication is a poor substitute for actual notice). The circuit court's decision to forego actual notice to any putative class member is completely indefensible under this Court's due process jurisprudence and provides another example of how the circuit court's eagerness to certify this class action violated the rights of State Farm as well as the absent putative class members. To the extent there is any doubt as to the due process requirements for class action notice, they should be resolved by this Court.

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[9] The inadequacy of the publication notice in this case is confirmed by the Notice Plan Implementation Report dated July 10, 1998, filed with the circuit court subsequent to the filing of the Petition. This Report indicates that a mere 15 opt-outs have been received by class counsel out of a publication notice plan that allegedly reached 78 % of the estimated five million putative class members. This represents an opt out rate of "far less than 0.01% of the class." *See* Notice Plan Implementation Report at 4-5, 7-8. The paucity of opt-outs received as a result of the publication notice can only mean that the notice was an inadequate means of reaching the putative class members. *See Shutts*, 472 U.S. at 813 (approving class notice by first class mail and noting that actual notice resulted in opt-outs by greater than 10% of the putative class).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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No. 97-2063

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

THE HONORABLE JOHN SPERONI,
TAMMY SNIDER AND MICHAEL AVERY,

Respondents.

On Petition for a Writ of Certiorari to the Illinois Supreme Court

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* AND BRIEF OF ALLIANCE OF AMERICAN INSURERS, AMERICAN COUNCIL OF LIFE INSURANCE, AMERICAN INSURANCE ASSOCIATION, HEALTH INSURANCE ASSOCIATION OF AMERICA, NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, AND NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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30 PP

No. 97-2063

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1997

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

THE HONORABLE JOHN SPERONI, TAMMY SNIDER AND MICHAEL AVERY,

Respondents.

On Petition for a Writ of Certiorari to the Illinois Supreme Court

MOTION OF ALLIANCE OF AMERICAN INSURERS, AMERICAN COUNCIL OF LIFE INSURANCE, AMERICAN INSURANCE ASSOCIATION, HEALTH INSURANCE ASSOCIATION OF AMERICA, NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, AND NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER

The Alliance of American Insurers, American Council of Life Insurance, American Insurance Association, Health Insurance Association of America, National Association of Independent Insurers, and National Association of Mutual Insurance Companies hereby move, pursuant to Rule 37 of this Court, for leave to file an *amicus curiae* brief in support of Petitioner. The motion is necessitated by the withholding of consent by Respondent the Honorable John Speroni.

The above-named associations are the principal trade associations for the life, health, and property and casualty insurance industry in the United States. Their collective membership comprises thousands of insurance companies, ranging from small insurers that operate in a single state to the largest U.S. insurers, including those that do business nationwide and those that also operate abroad.

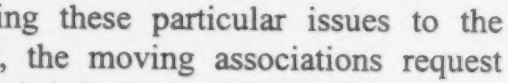
The issues presented in this case are of great significance to these associations and their members. The errors in the decisions of the Illinois courts below, if not corrected through immediate review by this Court, will invite repeated errors in future cases involving insurance. In particular, the determination of the Illinois circuit court that *all* of the claims of the approximately 5,000,000 class members from 48 different states in this case may be adjudicated under Illinois law alone poses a severe risk to due process and to the regulation of the business of insurance in accordance with the prior opinions of this Court.

The moving associations believe their brief will provide the Court with relevant legal and factual information not already brought to the Court's attention. First, the associations' brief documents the effect of the certification of a nationwide class action of this size and

monetary significance on a defendant's ability to pursue the litigation, despite lack of merit in the class claims. The brief thereby underscores why immediate review by this Court is critical. Second, the associations' brief provides a detailed discussion of the violations of the Due Process, Full Faith and Credit, and Commerce Clauses of the Constitution that are effected by the application of a single state's law to *all* of the claims of a nationwide class in a case where, as here, the forum state lacks an interest in the out-of-state plaintiffs' claims and there are fundamental substantive conflicts between that state's law and the laws of the states that do have an interest in those claims.

In order to bring these particular issues to the attention of the Court, the moving associations request leave to file their *amicus* brief submitted herewith.

Respectfully submitted,



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INTERESTS OF *AMICI CURIAE*

Amici are the principal associations of life, health, and property and casualty insurers in the United States. If the erroneous decisions of the Illinois courts below escape review by this Court, the constitutional violations affecting State Farm here will likely be repeated in future cases involving other insurers, with serious consequences to the stability and proper regulation of the business of insurance in the several states.[1]

SUMMARY OF ARGUMENT

The Illinois courts below determined that a class of as many as five million policyholders in 48 states may together litigate, under Illinois law alone, all of their claims involving individual State Farm insurance policies, despite the fact those individual policies are specifically and differently governed by the various laws of the 48 states where the policies were issued. The Illinois courts also determined that the plaintiffs, in litigating their claims under Illinois law, have no burden to verify – and State Farm will have no opportunity to disprove – their claims through evidence regarding the many specific, different vehicle parts that the individual plaintiffs allege to be inferior. Finally, the Illinois courts rejected State Farm's proposal that the plaintiff class receive notice of the litigation by first-class mail, holding that publication-only

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[1] Due to the withholding of consent by Respondent the Honorable John Speroni, the above-named associations have submitted herewith a motion for leave to file this brief as amici curiae. No counsel for any party in this case authored this brief in whole or in part, and no person or entity other than the amici curiae and their members made any monetary contribution to the preparation or submission of the brief.

notice would suffice. Each of these determinations violates the U.S. Constitution.

Immediate review by this Court is critical in order to prevent the Illinois courts' errors from escaping review. State Farm is under intense pressure to settle this case, both due to the high monetary stakes involved – as much as $2 billion – and because of the serious impairments to State Farm's defenses created by the errors below. In any large class action, the certification of the class creates an "intense pressure to settle." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). This is inherently true because "[t]he risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgement is low." *Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996). In this case, the risks of pursuing trial are many times greater than in the typical class action, because the Illinois courts' erroneous rulings have so severely impaired State Farm's ability to defend against those claims.

Further compounding these risks is the refusal by the Illinois courts to require notice to class members by first-class mail. If State Farm were to pursue the litigation and ultimately prevailed on the merits, large numbers of class members might claim insufficient notice, lack of jurisdiction, and the right to bring new actions, or even a new class action. The threat of such claims raises significantly the potential costs of litigation in State Farm's pre-trial calculus, and thus multiplies the pressures on State Farm to settle. Review by this Court now, therefore, may be the only opportunity to correct the errors below.

The Illinois circuit court's decision to apply Illinois' substantive law to all of the claims of the nationwide class in this case cannot be reconciled with the Due Process, Full

Faith and Credit, and Commerce Clauses of the Constitution. As this Court determined in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821 (1985), both the Due Process and Full Faith and Credit Clauses preclude the application of a single state's law to all of the claims of a nationwide class involving a "large number of transactions which the State proposes to adjudicate and which have little connection with the forum." In this case, as in *Shutts*, the forum state's lack of a connection to the out-of-state plaintiffs' claims, coupled with the substantive conflict between the forum state's law and the laws of other states, renders the application of the forum state's law so "arbitrary and unfair" as to exceed constitutional limits. *Id.* at 822.

Indeed, Illinois has *no* legitimate interest in the claims of the non-Illinois class members in this case. Contrary to the Illinois courts' opinions, the mere fact that State Farm is domiciled in Illinois does not create such an interest. State Farm is licensed to do business in each of the 50 states and the District of Columbia. In conducting its business outside of Illinois, State Farm enters into contracts with policyholders in accordance with the specific and comprehensive insurance regulatory requirements of the other individual states. Neither State Farm nor the plaintiffs from the 47 states other than Illinois at issue here could conceivably have expected that Illinois law would govern their contracts executed under those other states' laws. Under *Shutts*, therefore, the application of Illinois law to all of those out-of-state claims violates due process. *See id.* at 818-23 (due process in a contract dispute requires the application of state law in accordance with the expectation of the parties).

The application of a single state's law in a nationwide class action involving insurance policies is

particularly suspect because of the extensive regulation of the business of insurance by the several states. Unlike other contracts, insurance policies generally must be *specifically approved by state regulators.* The regulators review the forms, terms, and conditions of the policies for conformity to the specific laws of their state. Irrespective of an insurance company's domicile, the policies issued by an insurer licensed to operate in a given state are therefore comprehensively governed by that state's law, which may differ in a myriad of ways from the laws of the other states, including those of the company's state of domicile.

The Due Process and Full Faith and Credit Clauses are not the only constitutional provisions violated by the application of Illinois law to all of the nationwide class claims in this case. As this Court recognized in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the Commerce Clause also prevents a state, through its courts, from "legislating" beyond its borders. Further, the fundamental principles of federalism embodied in the McCarran-Ferguson Act of 1945, 15 U.S.C. § 1011, dictate that a state court may not, as the Illinois courts have done in this case, disregard the different state substantive laws prescribing what is acceptable conduct by companies engaged in the business of insurance. For all these reasons, immediate review of the decisions below is warranted by this Court.

ARGUMENT

I. IMMEDIATE REVIEW IS NECESSARY TO PREVENT DUE PROCESS VIOLATIONS FROM ESCAPING JUDICIAL SCRUTINY

This Court's immediate review is warranted by the extreme constitutional infirmities present in this case and

the fact that the effects of those infirmities may well preclude reviewability at a later date.

The Illinois circuit court's class certification order denies State Farm due process and thereby impermissibly increases the pressure on State Farm to submit to settlement, rather than risk trial. The coercive pressures to settle that are inherent in any class certification context are magnified here by the circuit court's ruling precluding State Farm from asserting its major defenses and permitting notice to potential class members by mere publication. These rulings produce a deadly combination: (i) State Farm's chances of prevailing on the merits are seriously impaired, thus increasing the likelihood of having to pay a massive judgment to the "class," but (ii) if State Farm nonetheless does prevail, it may find that the possibly millions of class members who received inadequate notice are not bound by the judgment and thus are free to sue again.

A. Even Absent the Due Process Violations Here, Class Certification Orders Exert Extreme Pressure on Defendants To Settle

The federal Courts of Appeals have repeatedly recognized that class certification orders are highly likely to escape review because they inherently coerce defendants to settle. In *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1297 (7th Cir. 1995), the Seventh Circuit noted that an appeal of a final judgment in the large class action in that case might well be precluded due to "the sheer magnitude of the risk to which the class action, in contrast to the individual actions pending or likely, exposes [the defendants]." Faced with such risk, defendants are "under intense pressure to settle," and, even if they have considerable confidence in their defenses, "may not wish to

roll the[ ] dice" by pursuing costly and protracted litigation. *Id.* at 1298. The Fifth Circuit has made similar observations: "Class certification magnifies and strengthens the number of unmeritorious claims. . . . [C]lass certification creates insurmountable pressure on defendants to settle. . . . The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low." *Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996). Likewise, the Third Circuit has stated that "class actions create the opportunity for a kind of legalized blackmail: a greedy and unscrupulous plaintiff might use the threat of a large class action, which can be costly to the defendant, to extract a settlement far in excess of the individual claims' actual worth." *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784-85 (3d Cir. 1995). *See also* Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973) (characterizing class action certifications as compelling "blackmail settlements").

Empirical evidence confirms the tremendous pressure on defendants to settle large class actions even where those actions lack merit. One study, for example, documents numerous settlements following class certifications with absolutely no relation to liability. *See* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions,* 43 Stan. L. Rev. 497, 566-68 (1991). Similarly, a recent article published by the American Law Institute-American Bar Association reports that settlements of large class actions are "simply an outcome of the math (even a small recovery for individual class members translates into a large sum of money when multiplied by several thousand plaintiffs)." Charles W. Schwartz & Lewis C. Sutherland, *Class Certification for Environmental and Toxic Tort Claims*, SB73 ALI-ABA 289, 302 (1997) (citing *Money for*

Nothing?, The American Lawyer, Jan./Feb. 1996, at 60). In fact, at a recent conference on class actions, "none of the large group of knowledgeable participants [plaintiff and defense counsel, judges and law school professors] could think of a single nationwide products liability or property damage class action that had gone to trial." Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 Cornell L. Rev. 941, 989 n.85 (1995) (citing Samuel C. Pointer, *Remarks at Research Conference on Class Actions,* Institute of Judicial Administration, New York University Law School (Apr. 22, 1995)).

Recent testimony before the House Judiciary Committee's Subcommittee on Courts and Intellectual Property aptly illustrates the point:

> All too frequently, corporate decision-makers are confronted with the implacable arithmetic of the class action: even a meritless case with only a 5 percent chance of success at trial must be settled, from the defendant's point of view, if the class complaint alleges hundreds of millions of dollars in damages. . . . [S]enior management of major American companies make the decision . . . to settle truly meritless lawsuits . . . [even] shortly after the company's lawyers have informed these senior executives that the chance of a judgment for the plaintiffs on the merits of the case is quite small.

Testimony of John L. McGoldrick, Senior Vice President for Law and Strategic Planning and General Counsel of Bristol-Myers Squibb Company, Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, Mar. 5, 1998, *available at* 1998 WL 122535.

Pursuant to legislation forwarded to Congress by this Court, there may soon be a check on erroneous class certifications by federal courts that might otherwise escape review due to the extreme pressures on defendants to settle once a class has been certified. *See* Petition ("Pet.") at 29 (discussing proposed Federal Rule of Civil Procedure 23(f)). This proposed interlocutory review mechanism is a result of "continuing concern that aggregation of large numbers of individually weak claims can create a coercive pressure to settle. Certification often is a major event, even a critical event." *Draft Minutes, Civil Rules Advisory Committee*, April 18-19, 1996, 167 F.R.D. 539, 549 (1996). In this case, the Illinois circuit court's certification of a nationwide class, to be notified by publication only and whose claims are to be collectively judged without an opportunity for State Farm to produce individualized evidence, is just such a critical event. Only this Court is in a position, and only at this time, to provide the interlocutory check on due process that is imperative in such a case.

B. The Due Process Violations in This Case Compound the Inherent Coercive Effects of Class Certification

The due process infringements in this case compound the inherent pressure to settle a class action of this size. First, State Farm has been deprived of its due process right to present defenses with respect to the individual claims of more than five million persons. The claims in this case revolve around the policy of State Farm (in some cases state-mandated) sometimes to use non-original-equipment-manufacturer ("non-OEM") "crash parts" (*e.g.*, hoods, fenders, side panels) in the repair of automobiles. The class members' claims involve tens of thousands of different domestic and foreign non-OEM parts

used in 48 different states. In a properly conducted proceeding, State Farm would be afforded the opportunity to introduce evidence with respect to each of those different parts. This Court has held repeatedly that " '[d]ue process requires that there be an opportunity to present every available defense.' " *Lindsey v. Normet,* 405 U.S. 56, 66 (1972) (quoting *American Sur. Co. v. Baldwin,* 287 U.S. 156, 168 (1932)); *see also United States v. Armour & Co.,* 402 U.S. 673, 682 (1971) (a defendant's "right to litigate the issues raised" is "a right guaranteed to him by the Due Process Clause"). Precluding such individualized proof by certifying this nationwide class, in addition to effecting a violation of due process, has amplified substantially the risks to State Farm of advancing to trial. The pressure to settle a case where one's right to a proper defense has been impaired is obvious. Although class actions may "achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated," they may not, as this Court recently recognized, be permitted to do so by "sacrificing procedural fairness or bringing about other undesirable results." *Amchem Prods., Inc. v. Windsor,* 117 S. Ct. 2231, 2246 (1997) (quoting Fed. R. Civ. P. 23(b)(3) (advisory committee's note)).

Second, both State Farm and the potential class members have been deprived of their due process rights to have notice of the litigation provided in the best practicable manner. As this Court has stated, "[i]f the forum State wishes to bind an absent plaintiff[,] . . . [t]he notice must be the best practicable, 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' " *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 812 (1985) (quoting *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314-15 (1950)).

State Farm's own records could have been used to mail an individualized notice to a given policyholder at his or her street address, as reflected in the company's files. The Illinois circuit court refused to require such notice, allowing the plaintiffs to provide publication notice only. That decision cannot be squared with this Court's precedents, which confirm that notice of a class action by publication is always suspect where means exist for providing notice by first-class mail. *See, e.g., Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 479 (1988); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 795-97 (1983); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974). Under this Court's opinion in *Shutts*, moreover, such notice is indispensable in order for a court to assert jurisdiction over the claims of nonresidents. As the *Shutts* opinion indicates, the Illinois court in this nationwide class action can acquire jurisdiction over nonresidents lacking the requisite contacts with Illinois *only* on the theory of implied consent, to be derived from the nonresident class members' failure to opt out of the class after having received notice by first-class mail. *Shutts*, 472 U.S. at 812. We submit that the inference of consent necessary to a state court's acquisition of jurisdiction over nonresidents in a multistate class action for damages may never be drawn from mere publication notice where, as here, the names and addresses of a large number of class members are readily available.

The very purpose of a notice requirement will be frustrated if the improper class certification here is left unaddressed pending final judgment on the merits. As the Seventh Circuit has stated, "successive suits by different members of the class would defeat the purpose of the rule to eliminate the judicial waste involved in processing repetitious litigation of the same issue." *Jimenez v. Weinberger*, 523 F.2d 689, 700 (7th Cir. 1975). *See also In*

re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 789 (3d Cir. 1995) (improper notice leaves both courts and defendants "exposed to the same potential for multiple lawsuits that class actions are designed to avoid"). The exposure of State Farm to potential challenges by class members to a resolution of this case on grounds of improper notice multiplies exponentially the potential litigation costs in State Farm's pre-trial calculus, and thus increases to an extreme the pressures on State Farm to settle. In light of those extreme pressures, only immediate review by this Court can ensure a correction of the errors below.

II. THE ILLINOIS COURTS' ORDERS ARE INCONSISTENT WITH CONSTITUTIONAL LIMITS ON STATE AUTHORITY AND THREATEN STATE REGULATION OF INSURANCE

This case strikes at the heart of insurance regulation, the province of the individual states. Throughout our nation's history, and as expressly provided by Congress in the McCarran-Ferguson Act of 1945, 15 U.S.C. § 1011, the business of insurance has been governed almost exclusively by state law . As such, the business of insurance is conducted in accordance with the different legislative and regulatory decisions of the several states, which reflect the various policy concerns relevant to the particular circumstances and needs of each individual state. In this case, a single state court has threatened to disrupt the system of individual state insurance regulation by certifying a nationwide class action for trial in which all the class members' claims will be judged under that single state court's view of Illinois law alone. That certification cannot be squared with the requirements of the U.S. Constitution, as interpreted by this Court.

A. Under This Court's Prior Decisions, Illinois Law Cannot Properly Apply to the Claims of the Entire Nationwide Class in This Case

In *Phillips Petroleum Co. v. Shutts*, *supra,* this Court found that both the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause of Article IV of the U.S. Constitution precluded the application of Kansas law in a nationwide class action involving a "large number of transactions which the State proposes to adjudicate and which have little connection with the forum." *Shutts*, 472 U.S. at 821. The Court determined that, "[g]iven Kansas' lack of 'interest' in claims unrelated to that State, and the substantive conflict with jurisdictions such as Texas," the application of Kansas law to every claim of the nationwide class would be so "arbitrary and unfair" as to exceed constitutional limits. *Id.* at 822.

The application of Illinois law in this nationwide class action involves at least as egregious a constitutional violation as the application of Kansas law to the class action in *Shutts*. In *Shutts*, a plaintiff class of approximately 28,000 royalty owners residing in the 50 states, the District of Columbia and several foreign nations, sued Phillips Petroleum Company, which owned property and did a significant amount of business in Kansas, in Kansas state court for recovery of interest on overdue royalty payments flowing from rights to leases of land located in 11 different states. This Court found that the substantive laws of Kansas could not constitutionally be applied to the claims of all of the class members because (i) Kansas lacked sufficient interests in the claims of the out-of-state plaintiffs to justify the application of Kansas law, and (ii) the application of Kansas law to the claims of

the plaintiffs from other states with inconsistent laws would frustrate the parties' reasonable expectations. *Id.* at 818-23.

With respect to the first point, this Court determined that Kansas' singular interest in regulating Phillips pertained to Phillips' conduct *within Kansas*. *Id.* at 819. The involvement of "hundreds of Kansas plaintiffs" in the case did not invest Kansas with an interest in the claims of the *non*-Kansas plaintiffs. *Id.* With respect to the second point, this Court concluded that there was "no indication that . . . the parties had any idea that Kansas law would control" claims relating to the leases involving land and royalty owners *outside* of Kansas. *Id.* at 822.

The two key considerations underlying this Court's decision in *Shutts* compel a similar ruling here. First, the only ground that the Illinois circuit court found for applying Illinois' substantive law to the claims of each and every one of the approximately 5,000,000 policyholders in 48 states seeking damages from State Farm was that State Farm is domiciled in Illinois. Pet. at 11a. But the fact that State Farm is domiciled in Illinois and does business there only vests Illinois with an interest in State Farm's actions *in Illinois*. It does not vest Illinois with a special interest in claims by out-of-state State Farm policyholders. It certainly does not empower the Illinois courts to adjudicate those claims under Illinois law, disregarding the differences between that law and the laws of the other states where State Farm is licensed to do business.

Second, neither party to State Farm's non-Illinois policies could conceivably have expected that Illinois law would govern, since the policy terms were dictated by the laws of the individual states where they were issued. The insurance regulators in those other states specifically approved State Farm's policy forms and terms, including

those regarding the use of non-OEM parts. *See* Pet. at 4. Any suggestion that the non-Illinois plaintiffs here expected Illinois law to govern their policies is frivolous, at best.

The strong reasons why Illinois law cannot constitutionally govern all of the class members' claims here are further revealed by a comparison of the facts of this case with those of *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) (plurality opinion). In *Hague*, the representative of a deceased Allstate policyholder sued Allstate in Minnesota state court for recovery of uninsured motorist benefits arising out of an accident in Wisconsin. Allstate contended that the application of Minnesota law was unconstitutional since the accident did not occur in Minnesota and the deceased insured was not a Minnesota resident. A plurality of the Court disagreed, finding that three contacts with Minnesota – none of which has any parallel or analogue in this case – were sufficiently significant to give Minnesota an interest in the suit.

First, the insured party (deceased) had worked in Minnesota and commuted daily to his job there. Second, Allstate did business in Minnesota.[2] Third, the insured's representative, the plaintiff/respondent, became a Minnesota resident prior to suing. Collectively, these

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[2] Notably, Justice Powell, in his separate opinion in *Hague*, emphasized that because Allstate did business in all of the 50 states, the fact that it did business in Minnesota could be relevant only with respect to business actually done *in that state*. *Hague*, 449 U.S. at 338 ("The forum state has no interest in regulating that conduct of the insurer unrelated to property, persons, or contracts executed within the forum State.") (Powell, J., dissenting, joined by Burger, C.J., and Rehnquist, J.).

contacts gave Minnesota a stake in the resolution of the case because Minnesota had interests in: (i) the well-being of its work force and the effect of injured employees on Minnesota employers; (ii) the regulation of Allstate's insurance obligations *insofar as they affected a Minnesota resident*; and (iii) the recovery of the insured's representative as a means to ensure her financial stability and prevent her dependence on state economic assistance. Collectively, the plurality concluded, these interests provided a sufficient basis for the application of Minnesota law. *Hague*, 449 U.S. at 313-20. The plurality also noted that the application of Minnesota law would not frustrate Allstate's reasonable expectations, in part because Allstate "was undoubtedly aware that Mr. Hague [the insured] was a Minnesota employee." *Id.* at 318 n.24.

None of the types of interests that justified the application of Minnesota law in *Hague* exists here. Plainly, Illinois has no interest in regulating State Farm's obligations to policyholders outside Illinois where that conduct has no effect on Illinois. Nor does Illinois have an interest here comparable to Minnesota's interest in regulating Allstate's insurance obligations "insofar as they affected both a Minnesota resident and . . . a long-standing member of Minnesota's work force . . . ." *Id.* at 318. Finally, as emphasized above, neither the out-of-state class members here nor State Farm could reasonably have expected that their policies would be governed by Illinois law – rather than the laws of the various other states where the contracts were executed and performed.

In declaring that Illinois law could apply to each and every one of the more than five million class members' claims in this case, the circuit court below engaged in just the type of "bootstrapping" that this Court disapproved in *Shutts*. The *Shutts* Court expressly directed that a state may

not use its assumption of personal jurisdiction over the claims of plaintiffs whose principal contacts are with other states as an "added weight in the scale when considering the permissible constitutional limits on choice of substantive law. It may not take a transaction with little or no relationship to the forum and apply the law of the forum in order to satisfy the procedural requirement that there be a 'common question of law.' " *Shutts*, 472 U.S. at 821. This, however, is precisely what the Illinois circuit court has done. *See* Pet. at 10a-11a.

Permitting the decision below to go unreviewed would invite a further result that this Court expressly disapproved of in *Shutts*. As the Court stated there: "If a plaintiff could choose the substantive rules to be applied to an action . . . the invitation to forum shopping would be irresistible." *Shutts*, 472 U.S. at 820 (quoting *Hague*, 449 U.S. at 337 (Powell, J., dissenting)). Such "forum shopping" not only is at odds with due process, but also, as discussed below, has the unconstitutional effect of intruding on individual state regulation. "The simple institution of a multistate class suit in one forum cannot provide the foundation for applying that forum's law to nonresidents, without creating a 'substantial threat to our constitutional system of cooperative federalism.' " 3 Herbert Newberg & Alba Carte, *Newberg on Class Actions* § 13.29, at 13-90 (3d ed. 1992) (quoting *Nevada v. Hall*, 440 U.S. 410, 424, n.24 (1979)).

B. Permitting This Nationwide Class Action To Proceed Would Seriously Undermine the State Insurance Regulatory Function

This Court has expressly recognized that it was Congress' intent, in enacting the McCarran-Ferguson Act of 1945, "to give support to the existing and future state

systems for regulating and taxing the business of insurance." *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429 (1946). As the Court has emphasized, Congress has "expressly and affirmatively [declared] that continued state regulation and taxation of th[e] business [of insurance] is in the public interest and that the business and all who engage in it 'shall be subject to' the laws of the *several* states in these respects." *United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 500 (1993) (quoting *Benjamin*, 328 U.S. at 430) (emphasis supplied). This dictate, coupled with the constitutional limits on and protections for individual states' authority, forms a critical underpinning of this Court's jurisprudence in cases involving the "business of insurance."

In determining that Illinois law could apply to all of the millions of claims of the potential class members in this case, the Illinois circuit court ignored the fundamental principles of federalism underlying the McCarran-Ferguson Act, as well as this Court's recognition of how those principles interact with the Commerce Clause to limit legislative and judicial intrusions on individual states' authority. As this Court has recognized, when Congress provided in the McCarran-Ferguson Act that "the insurance business 'shall be subject to the laws of the several States which relate to the regulation or taxation of such business,' it indicated . . . that such state 'regulation or taxation' should be kept within the limits" set by the Court's prior decisions holding that "a State does not have power to tax contracts of insurance or reinsurance entered into outside its jurisdiction by individuals or corporations resident or domiciled therein covering risks within the State or to regulate such transactions in any way." *State Bd. of Ins. v. Todd Shipyards Corp.*, 370 U.S. 451, 455-56 (1962) (quoting 15 U.S.C. § 1012; H.R. Rep. No. 79-143, at 3 (1945)). *See also Federal Trade Comm'n v. Travelers*

Health Ass'n, 362 U.S. 293, 301 (1960) ("it is clear that Congress [in enacting the McCarran-Ferguson Act] viewed state regulation of insurance solely in terms of regulation by the law of the State where occurred the activity sought to be regulated").

In *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), this Court outlined the core reasons why the Commerce Clause will not permit a state to "legislate" beyond its borders. In discussing individual states' rights to require disclosure by automobile distributors of presale repairs affecting the value of a vehicle, the Court described the various approaches states might take and the latitude they enjoy in choosing specific approaches based on local circumstances. The Court explained, in statements that resonate in the insurance regulation context:

> No one doubts that a State may protect its citizens by prohibiting deceptive trade practices . . . . But the States need not, and in fact do not, provide such protection in a uniform manner. Some States rely on the judicial process to formulate and enforce an appropriate disclosure requirement . . . . Other States have enacted various forms of legislation that define the disclosure obligations of automobile manufacturers, distributors, and dealers. The result is a patchwork of rules representing the diverse policy judgments of lawmakers in 50 States.

Id. at 568-69 (footnote omitted).

These statements are fully applicable by analogy in this case. Just as states may have particular policy reasons for developing, or refraining from developing, disclosure requirements regarding a vehicle's pre-sale condition, so do

the states have multiple, distinct policy reasons for adopting different insurance laws and regulations, including legislation on the use of non-OEM parts and on many other issues. The implications here are broad. To appreciate that breadth, consider an example from a wholly different insurance context. Certain states have expressly provided by statute that health insurers are required to provide coverage only for "serious" mental illnesses, and have specified what those illnesses are. *See* 1998 Delaware Laws Ch. 275 (H.B. 156) (Del. Code Ann. tit. 18, § 3343); Me. Rev. Stat. Ann. tit. 24-A, § 2749-C (1997). These states have determined that broader mandated coverage would not be in the best interests of their citizens, generally because requiring coverage of *all* mental illnesses might increase health insurance costs. But if all the plaintiffs in a nationwide class action, including policyholders in the states with such laws, were allowed to prevail in the courts of another state on claims that it constitutes consumer fraud not to treat *all* mental illnesses as covered by a company's health insurance, particularly group health insurance, the specific legislative determinations of the states that expressly limited coverage to *serious* mental illnesses would effectively be nullified. Likewise, in virtually every area of insurance, such judicial overreaching could wreak havoc on the specific policy choices made by state legislatures regarding how best to ensure the availability and adequacy of insurance for their citizens.

Allowing one state's court, such as the Illinois circuit court in this case, to override the policies and regulations of other states simply in order to facilitate litigation of a nationwide class action cannot be squared with the principles underlying the McCarran-Ferguson Act and this Court's opinion in *BMW*. As the Court stated in *BMW* with respect to the limits on Alabama's authority to punish conduct outside Alabama:

> We think it follows from th[e] principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States. . . . [B]y attempting to alter BMW's nationwide policy, Alabama would be infringing on the policy choices of other States. . . . Alabama may insist that BMW adhere to a particular disclosure policy in that State. *Alabama does not have the power, however, to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents. Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions.*

BMW, 517 U.S. at 572-73 (footnotes omitted) (emphasis supplied).

As underscored in *BMW*, "[s]tate power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute." *Id.* at 572 n.17 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964)). Accordingly, the principles that preclude states from enacting legislation that excessively burdens the independence of other states apply with equal force to judicial decisions in cases such as this. Plainly, the Illinois courts below failed to abide by those principles in this case. To prevent further harm from the derogation from those principles in this case and others, this Court should grant the petition for review.

CONCLUSION

For all the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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No. 97-2063

In The

Supreme Court of the United States

October Term, 1997

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

vs.

THE HONORABLE JOHN SPERONI, TAMMY SNIDER, and MICHAEL AVERY,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

BRIEF IN OPPOSITION FOR RESPONDENTS TAMMY SNIDER, MICHAEL AVERY AND PLAINTIFF CLASS

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QUESTIONS PRESENTED

Defendant State Farm filed its petition after the Illinois Supreme Court declined, without opinion, to grant its request for extraordinary relief to seek interlocutory review of pretrial orders (1) certifying a consumer litigation class; and (2) directing implementation of an initial class notice program. The underlying lawsuit is ongoing. The parties are engaging in pre-trial discovery. The trial on the merits is scheduled to commence on April 13, 1999. The questions before this Court on the limited record now available are:

1. Whether this Court's jurisdiction is properly invoked under 28 U.S.C. § 1257 to review a State court's discretionary denial of leave to file a petition for a writ of mandamus, writ of prohibition and/or supervisory order when the denial is without opinion and further review is not foreclosed;

2. Whether the Due Process Clause of the Fourteenth Amendment requires a State's highest court to afford mandatory interlocutory review of State trial court decisions certifying class actions or ordering class notice;

3. Whether, for purposes of making its initial determination that a multi-state class may be certified, a trial court can constitutionally find that forum state law will likely apply to all claims at the anticipated trial under a state's choice-of-law rules, where the misconduct is alleged to have been conceived in, implemented from, and controlled by the defendant from its headquarters in the forum state;

4. Whether the Due Process Clause entitles a defendant to insist on eliciting the individual testimony of each of the millions of the policyholders that comprise the class, where the evidence submitted by the parties demonstrates, and the trial court determines, that the case presents predominantly common issues of fact that can be determined at trial on a class-wide basis from the defendant's own documents and records, third-party evidence, and expert testimony, and the trial court has made no order depriving defendant of a reasonable defense; and

5. Whether the Due Process Clause of the Fourteenth Amendment prohibits a State court from ordering dissemination of class notice through an intensive multi-media notice publication program, when defendant does not provide an accurate or complete list of class members to whom mailed notice could be sent, and where the notice program is proved to be effective in providing *actual* notice to the class.

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OPINIONS BELOW

Respondents note two additional opinions below: (1) A January 21, 1998 Illinois Supreme Court unreported order, without opinion, taking no action on State Farm's first petition for extraordinary writ (Res. App. A); (2) The Trial Court's February 26, 1998 unreported order denying State Farm's request for leave to file interlocutory appeals of the class certification and notice rulings (Res. App. B).

STATEMENT OF JURISDICTION

This Court lacks jurisdiction to entertain this Petition under 28 U.S.C. § 1257. *See infra* at 7-14.

STATEMENT OF THE CASE

The underlying lawsuit, *Snider v. State Farm Mut. Auto. Ins. Co.*, is a straightforward consumer deceptive practices and breach of uniform contract case, involving one company's common course of conduct, and a comparison of what plaintiffs claim is a deceptive and illegal disparity between its standard contract provisions and its actual auto repair practice. The suit was brought in Illinois, where State Farm is headquartered, and from where the conduct at issue emanates. The suit was filed in Illinois State court because there is no federal statute involved and the minimum amount in controversy for diversity jurisdiction is not met. Lead plaintiff/class representative Tammy Snider was a resident of Marion, Williamson County, Illinois, where the suit was filed. The Trial Court certified a plaintiff class, and ordered the dissemination of notice. The parties are preparing for trial. State Farm has attempted to delay these proceedings by, *inter alia*, pursuing multiple specious interlocutory appeals.

A. The Trial Court's Certification Order Was Based On A Substantial Factual Record Submitted By Both Parties at a Four-Day Evidentiary Hearing.

1. The class certification hearing conducted by the Trial Court included a four day evidentiary hearing that included exhaustive testimony from both parties, and the admission of 189 exhibits from Plaintiffs, plus substantial evidence from State Farm, regarding the way State Farm determines what it will pay to repair its

insureds' cars when accident claims are made. (*Id.* at 6, 8-9.) The evidence proved that State Farm's insurance policies include materially identical contractual provisions that require State Farm to pay to restore insureds' cars to their pre-loss condition using parts of "like kind and quality." In an alleged violation of this contractual language, State Farm allows coverage only for the cheapest parts, even when such parts are imitation "non-original equipment manufacturer" ("non-OEM") parts.

Plaintiffs demonstrated at the class certification hearings that the trial in this case will involve common issues: First, the Trial Court must decide if the 25 imitation, non-OEM "crash parts" that are the subject of the *Snider* action (the order attached as Pet. App. C defines the class of insureds and specifies the 25 crash parts involved in this case) are categorically and inherently inferior. Second, the Trial Court must resolve the legal question of whether Petitioner, by requiring the uniform use of these parts, and through a course of conduct designed to conceal the true import of this practice from its policyholders, breached its contractual obligations and committed consumer fraud.[1]

2. On December 5, 1997, the Trial Court issued its 17-page opinion summarizing the evidence and finding that plaintiffs satisfied the numerosity, commonality, typicality, adequacy of representation, predominance and practicability requirements of 735 ILCS 5/2-801, *et seq.*, Illinois' counterpart to Fed. R. Civ. P. 23, warranting certification of the plaintiff class, whose members reside in 48 states. Trial Court's opinion, the culmination of five months of intensive Class-related briefing and hearings, reflects careful consideration of applicable Illinois state precedent and federal jurisprudence, including *AmChem Prods. Inc. v. Windsor*, 117 S. Ct. 2231 (1997) and *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), and the evidence, arguments and proposed orders and findings presented by both sides.

---

1. Nothing in this lawsuit will prevent State Farm or anyone else from using non-OEM parts, provided it does so under appropriate policy language and that it fully discloses its claims practice. Plaintiffs seek from the Trial Court a judgment that corrects State Farm's deceptive practice, enables consumers to make fully informed decisions about their insurance coverage, and gives State Farm's policyholders what they paid for, nothing more and nothing less.

Petitioner incorrectly asserts that the Trial Court made a choice-of-law ruling in its certification order; it did not. Instead, the Trial Court held that, under the particular factual circumstances of this case, it was likely that the Court *could* apply Illinois law to all claims. The *Snider* court held:

> ***While it is not necessary for the Court at this time to decide upon choice of law*** as to the breach of contract claim, it does note that **the eventual decision as to choice of law will not prevent the certification of the Class in this case**. . . . ***The Court retains the right to divide the litigation into a manageable number of sub-classes under 2-802(b) should differences in law present themselves***.

(Pet. App. at 11a (emphasis added)). Illinois law, and United States Supreme Court precedent, provide that the Trial Court may apply forum law classwide or, in the alternative, apply multiple states' laws and create any necessary subclasses. The Trial Court's class certification order recognizes these alternatives. (*Id.* at 10a-11a.)[2]

At the Trial Court concluded: "Plaintiffs will now have the opportunity to try and prove the merits of their claims, which is an entirely different matter from establishing the requirements for class certification." (Pet. App. at 16a.)

B. The Trial Court's Notice Order Was Based Upon The Evidence Presented By The Parties.

Both parties extensively briefed the notice issue with each party submitting a class notice proposal supported by evidence and affidavits. The Trial Court then held a full-day evidentiary hearing on December 29, 1997. (Lodging App. at 12.) Afterwards,

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2. When the Trial Court makes a choice of law determination, class members and other interested persons (including State Attorneys General and Commissioners of Insurance, all of whom are aware of the *Snider* action) may seek to demonstrate that a particular state's law affords more protection and better remedies to class members resident in that state. In that instance, the Court may (and has indicated that it will) create subclasses for the benefit of such residents. (*Id.* at 11a.)

both parties submitted additional briefing. On February 25, 1998, the Trial Court issued a 13-page order directing implementation of a notice plan similar to the plan submitted by Respondents. As refined by the trial court, the *Snider* notice plan (described in more detail, *infra* at 26-27) called for publication of notice in six major national publications and over 850 local newspapers, covering every state. The notice was disseminated over the Internet and by "earned media" efforts which generated news and feature stories on the *Snider* action. The notice plan, which has now been completed, cost over $585,000, and reached over 78% of the potential class members (7/9/98 Notice Imp. Aff. at 2), a substantially higher percentage than Petitioner's mailed notice would have reached.

In response to Petitioner's contentions that due process required mailed notice in this case, the Trial Court found that petitioner was unable to provide a reasonably accurate or complete list or class members, and that mailed notice was therefor ineffective and impracticable. (*Id.* at 26a.) The Court held:

> [n]othing in *Mullane* requires individual mailed notice be afforded to an inaccurate and incomplete list of class members, especially given the equally or more effective published notice campaign which can be implemented in this case.

(*Id.* at 29a.)

C. Petitioner State Farm Has Pursued Multiple Appeals And Otherwise Acted To Delay The Pretrial Proceedings.

1. Although Illinois practice (like federal practice) allows for interlocutory appeal when the trial court finds that "immediate appeal from the order may materially advance the ultimate determination of the litigation," Ill. Sup. Ct. Rule 308(a), and although this procedure is available to review class certification orders, *Miner v. Gillette Co.*, 428 N.E. 2d 478, 480 (Ill. 1981), *cert. dismissed*, 459 U.S. 86 (1982); *Gordon v. Boden*, 586 N.E. 2d 461 (Ill. App. 1991), *Petitioner chose to voluntarily bypass this normal procedure for seeking appellate review.* Instead, on the close of business on December 23, 1997, Petitioner filed a

petition for extraordinary writ with the Illinois Supreme Court. Petitioner chose to appeal directly to the Illinois Supreme Court despite the fact that mandamus is an "extraordinary remedy," *Statland v. Freeman*, 493 N.E. 2d 1075, 1077 (Ill. 1986), which "will not lie to correct an abuse of discretion." *Owen v. Mann*, 475 N.E. 2d 886, 890 (Ill. 1985).[3]

On January 21, 1998, the Illinois Supreme Court declined to grant Petitioner's request for discretionary extraordinary relief. (Res. App. A.)

2. Next, State Farm filed for and received an *ex parte* temporary restraining order on January 28, 1998, from the Hon. Albert Green to stop the ongoing *Snider v. State Farm* litigation.[4] 1/28/98 Hearing at 18-22. After Respondents made a special appearance, Judge Green determined that he had been misinformed, and presented incomplete and misleading information by State Farm, and had erred in issuing the temporary restraining order. 2/4/98 Hearing at 34-36.

3. On February 25, 1998, after briefing and hearing, the Trial Court entered its order approving the class notice plan. (Pet. App. D.) Petitioner then requested leave under Ill. Sup. Ct. Rule 308 to seek interlocutory review of the court's certification and notice orders. Declining Petitioner's request, the Trial Court noted:

> In the almost three months since this class was certified, there has not been any request for a

3. Because Illinois practice currently affords the opportunities for discretionary review of class certification orders that Federal practice may prospectively provide under the new Rule 23(f), anticipated to become effective December 1, 1998, this case does not present the Question of a lack of adequate review that Petitioner and *amicus* assert. Rather, Petitioner failed at what we assume to be a strategic choice to attempt to end run the normal course of interlocutory appeal in its home State's courts.

4. An earlier case involving non-OEM parts, *Krusinski v. State Farm*, No. 87C710253 had been filed in Cook County Illinois Court and assigned to the Hon. Albert Green. Judge Green certified an Illinois-only class after State Farm had agreed to settle claims arising from its use of non-OEM parts which had occurred prior to April 16, 1994. This case was entirely concluded, and the *Snider* class definition excluded these claims.

> Rule 308 appeal by State Farm or really any inkling given to the Court that any such request would be made. We are now 11 months away from the scheduled trial date in this case, and . . . significant resources have already been expended. . . . [A]ll the issues . . . that State Farm requests for interlocutory appeal can, of course, be decided by direct appeal [after] trial. (Res. App. at 13a.)

The next day, Petitioner again filed a request for extraordinary writ with the Illinois Supreme Court, raising the three issues it raises before this Court. After extensive briefing on March 24, 1998, that Court issued an order denying, without opinion, the motion for extraordinary writ. (Pet. App. A.)

SUMMARY OF ARGUMENT

State Farm's Petition should be denied on the following grounds:

• *Jurisdiction.* This Court lacks jurisdiction under 28 U.S.C. § 1257 because there is no final judgment, and no federal issue.

• *Ripeness.* Even if jurisdiction did exist, this Court should decline review because issues raised by Petitioner are not ripe for review; the underlying orders are inherently tentative and subject to alteration by the state trial court.

• *No Mandatory Review of Certification Orders.* Petitioner's request for mandatory interlocutory review of a trial court decision certifying a class is improper, under this Court's decision in *Coopers*, and under the principles of federalism which protect the ability of State courts to control their own appellate procedures.

• *Choice of Law.* The Trial Court's finding that any eventual decision as to choice of law would not bar certification raises no federal question. The eventual hearing before the Trial Court will show there are no true conflicts under *Philips Petroleum Co. v. Shutts*; assuming, *arguendo,* any conflicts existed, Illinois has sufficiently substantial governmental interests to apply its law to all claims. Petitioner and Amicus will have a full opportunity to

present their choice-of-law arguments to the Trial Court before any final determination is made.

• *Class Certification.* The Trial Court's class certification decision was consistent with the substantial evidentiary record created by the parties, raises no federal question, and is consistent with applicable law.

• *Notice.* No rule of law or reason requires a trial court to order notice by mail, where such notice is demonstrated to be impracticable and effective, and where notice by publication is proved to be effective in providing *actual* notice.

REASONS FOR DENYING THE WRIT

I. THIS COURT CANNOT AND SHOULD NOT ENTERTAIN PETITIONER'S REQUEST FOR INTERLOCUTORY REVIEW.

A. There Is No "Final Judgment" To Be Reviewed.

This Court's power to review State court decisions is limited by Art. U.S. Const. Art. III § 2, which gives this Court "appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." Ever since 1789, Congress has granted this Court power to review only "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257.[5]

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5. The final judgment rule is an important component of our federal system. *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 67 (1948). First, the final judgment rule "avoids the mischief of economic waste and of delayed justice," *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945), by allowing cases to proceed to and through trial without being subjected to expensive and time-consuming piecemeal review by this Court. *See Flanagan v. United States*, 465 U.S. 259, 264 (1984) (same). Second, by requiring a full trial and appellate record the rule "avoids giving advisory opinions in cases where there may be no real 'case' or 'controversy' in the sense of Art. III." *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973); *see also Regional Rail Reorganization Act Cases*, 419 U.S. 102, 144 (1974) (same). Third, the final judgment rule allows consideration of state law issues first, thereby avoiding premature or unnecessary constitutional adjudication. *Republic Natural*

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The judgment upon which review is sought is not final. Any reviewable judgment must be final in two senses:

> It must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.

Market St. Railway Co. v. RR. Comm'n of California, 324 U.S. 548, 551 (1945).

> [T]he test is not whether under the local rules of practice the judgment is denominated final . . . but rather whether the record shows that the *order of the appellate court has in fact fully adjudicated rights* and that that adjudication *is not subject to further review by a state court.*

Department of Banking of Nebraska v. Pink, 317 U.S. 264, 268 (1942) (*per curiam*) (emphasis added).

The effect of a judgment under local practice plays a key role in determining if a judgment is final. As in *Gospel Army v. Los Angeles*, 331 U.S. 543, 548 (1947), where jurisdiction was found lacking because "the effect of the judgment under state practice is to remand the case for a new trial," the practical effect of the judgment below under Illinois law will begin our analysis of the lack of a "final judgment" below.

Under Illinois law, finality "is determined by the substance as opposed to the form of the order." *Branch v. European Autohaus, Ltd*, 424 N.E. 2d 6, 8 (Ill. 1981). A final judgment is "a determination by the court on the issues presented by the pleadings which ascertains and fixes absolutely and finally the rights of the

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Gas Co., 334 U.S. at 71. Finally, as Justice Frankfurter noted in *Radio Station WOW, Inc.*, "this prerequisite to review derives added force when the jurisdiction of this court is evoked to upset the decision of a State court," *Id.*, 326 U.S. at 124, as it "leave[s] at a minimum federal intrusion in state affairs." *North Dakota State Bd. of Pharmacy*, 414 U.S. at 159.

parties in the lawsuit." *Flores v. Dugan,* 435 N.E. 2d 480, 482 (Ill. 1982). "Where an order of the court leaves a cause still pending and undecided, it is not a final order." *O'Hara v. State Farm Mut. Auto. Ins. Co.,* 484 N.E. 2d 834, 836 (Ill. App. 1985).

Denial of review is not a final judgment. As the court in *South Chicago Community Hosp. v. The Industrial Comm'n,* 254 N.E. 2d 448, 449 (Ill. 1969), found:

> [t]he order which dismissed writs of certiorari . . . is plainly interlocutory. It did not decide the right to compensation, nor did it determine a separate issue of the litigation which will result in its final disposition.

See also Relph v. The Bd. of Educ. of DePue Sch. Dist., 420 N.E. 2d 147, 150 (Ill. 1981) (denial of leave "has no precedential effect and in no way amounts to a consideration of the merits.").

Under Illinois practice the decision below is therefore not a final judgment. The order neither ascertained nor fixed absolutely and finally either Respondents' or Petitioner's rights. The order upon which *certiorari* is sought left the underlying dispute still pending, with discretionary interlocutory relief under Ill. Sup. Ct. Rule 308, direct appeal as of right under Ill. Sup. Ct. Rule 301 or further petition via writ to the Illinois Supreme Court still available.[6] Because "further review or correction" *Market St. Railway Co.,* 324 U.S. at 551, is available under Illinois state procedure as a matter of discretion and right, and the decision of the Illinois Supreme Court has not "in fact fully adjudicated rights," *Pink,*

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6. The underlying orders of the Trial Court are not final orders. Under Illinois law the certification order is not final and can — as the Trial Court did with its February 11, 1998 order, modifying the class definition to add a "crash parts" definition — be modified at any time. *See* 735 ILCS § 5/2-802. Likewise the court is free to order additional notice, *see* 735 ILCS § 5/2-802(b); Manual for Complex Litigation, Third (Federal Judicial Center 1995), § 30.232 to designate subclasses, 735 ILCS 5/2-803, or to make a choice of law determination at an appropriate time.

317 U.S. at 268. Review by this Court is therefore foreclosed as a matter of federal law under 28 U.S.C. § 1257.[7]

State Farm implies that "finality," for purposes of 28 U.S.C. § 1257 jurisdiction, is the rejection by a State's highest court of any particular petition for review, even if review may be obtained at a later date by the filing of a subsequent appeal. This semantic argument is unable to nullify the express limits placed on this Court by 28 U.S.C. § 1257.[8]

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7. The Trial Court's orders would not be final under 28 U.S.C. § 1291 either. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978).

> First, such an order is subject to revision in the District Court. . . . Second, the class determination generally involves considerations that are "enmeshed in the factual and legal issues comprising the plaintiff's cause of action." . . . Finally, an order denying class certification is subject to effective review after final judgment,

Id. (internal citations omitted). *Coopers* applies with equal force to the review of State court judgments under 28 U.S.C. § 1257. C.f., *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 502 (Rehnquist, J. dissenting). Foreclosing review in this case this Court noted: "we hold that orders relating to class certification are not independently appealable under § 1291 prior to judgment." *Coopers & Lybrand*, 437 U.S. at 470.

8. By neither raising nor relying upon the exceptions to finality under 28 U.S.C. § 1257 contained in *Cox Broad. Corp.*, *supra*, State Farm waived these arguments under Sup. Ct. Rule 14.1(a). *See Taylor v. Freeland & Kronz*, 503 U.S. 638, 645 (1992) (issues may not be raised for first time in opening brief). Respondents feel constrained, however, to note that this is not a circumstance where these special rules might apply.

First, this is not the case where "the federal issue is conclusive or the outcome of further proceedings preordained," *Cox Broad. Corp.*, 420 U.S. at 477, 479. Although Respondents would be pleased to have Petitioner concede liability, both trial on the merits and Petitioner's right to an appeal persist. Both present opportunities to decide the case without decision on the federal issues. *Second*, this is not a circumstance where "the federal issue, finally decided by the highest court in the State, will survive to require decision regardless of the outcome of further state-court proceedings." *Id.* at 480. Any number of rulings prior to or at trial, or the eventual judgment itself in this case, could be against Respondents, thereby removing the need to decide the Federal issues. *Third*, this is not a situation

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The flaw in Petitioner's apparent argument is shown by *Gillette Co. v. Miner,* 459 U.S. 86 (1982). In *Miner,* the Illinois Supreme Court had provided *interlocutory review* of class certification issues under Ill. Sup. Ct. Rule 308, *see Miner*, 428 N.E. 2d at 480, and remanded the case to the trial court. *Id.* at 20. In a *per curiam* opinion this Court held, "[t]here being no final judgment, the writ of certiorari is dismissed for want of jurisdiction." *Gillette Co.*, 459 U.S. at 86.

Both Interlocutory appeals under Ill. Sup. Ct. Rule 308 and petitions for extraordinary writ under Rule 381 and 383 are at the court's discretion, and the result on remand — further proceedings — are identical. *Carey v. Scotillo,* 417 N.E. 2d 1356, 1359 (Ill. 1981). Allowing jurisdiction to be founded merely on the name of the relief sought; mandamus *vs.* interlocutory appeal; as Petitioner appears to argue, would disregard this Court's admonition that:

> The test is not whether under the local rules of practice the judgement is denominated final . . . but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that the adjudication is not subject to further review by a state court.

Pink, 317 at 268. Where the results of the order below are identical to that in *Gillette Co.*; further proceedings in the trial court, this Court's conclusion must be identical — there is no jurisdiction under 28 U.S.C. § 1257.

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where "the federal claim has been finally decided . . . [and] later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 801. Nothing in Illinois law prevents Petitioner from raising these issues again. *Fourth*, this is not a circumstance where "the federal issue has been finally decided in the state courts . . . [and] a refusal immediately to review the state-court decision might seriously erode federal policy." *Id.* at 482-483. The argument that special rules of finality are necessary in class actions to prevent parties from settling was unanimously rejected in *Coopers & Lybrand*, 437 U.S. at 467-470. This ruling requires rejection of any argument by Petitioner that if it cannot secure review, it may have to compromise the underlying action. *See also infra*, n.14 (empirically challenging Petitioner's contention).

The cases cited by Petitioner entirely fail to support its simplistic argument that because other mandamus petitions have been "final," the Illinois Supreme Court's denial of mandamus is "final" under 28 U.S.C. § 1257. Each case cited by Petitioner is distinguishable because the underlying State court's action (styled as mandamus or prohibition): (1) addressed and decided the federal issues on the merits with no further review available; and (2) conclusively determined the constitutional limits of a lower court's jurisdiction. Here, the only issues raised by State Farm concern a trial court's findings on the record; none concern issues of power to adjudicate, which are traditionally raised in separate proceedings. Also, here there is no indication the Illinois Supreme Court based its decisions on the federal question Petitioner asserts, nor did its decision foreclose further review.[9] Petitioners have not cited a single case arising in circumstances similar to those of this Petition were this Court has found jurisdiction, and the undersigned counsel have been unable to locate one.

B. There Is No Federal Question.

The denial of leave below *without opinion* also raises serious jurisdictional questions which foreclose review at this time. The Illinois Supreme Court may have declined leave as a matter of discretion, on state substantive or procedural grounds, or due to the lack of a federal issue. It is impossible to know, or to divine, the reasoning of the Illinois Supreme Court or to determine if they decided, or erred in deciding, a federal issue.

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9. The final opinion cited by Petitioner, *Board of Educ. of Los Angeles v. Superior Court*, 448 U.S. 1343 (1980), is merely a statement of probable jurisdiction by then-Justice Rehnquist sitting as Circuit Justice. It is also not clear that the jurisdictional issues were clearly raised or briefed by the parties. Then-Justice Rehnquist's statement in *Board of Educ. of Los Angeles* should be viewed as an example of the exceptions in *Cox Broad. Corp., supra*, n.8, not at issue here. Petitioners in that case requested a stay of an action they contended would destroy their federally protected rights, thereby implicating the fourth *Cox Broad.* exception. *See id.* No such claim is or can be made by Petitioner here.

Defendant also cites to Robert L. Stern, et. al., *Supreme Court Practice* 108 (7th ed. 1993). However, nowhere in that work do the authors suggest that jurisdiction exists in the circumstances of this case.

It is well-recognized that this Court lacks jurisdiction to review decisions based upon independent and adequate state grounds. *Fox Film Corp. v. Muller,* 296 U.S. 207 (1935). This being so, this Court has held that it lacks jurisdiction absent a showing by Petitioner that the court below decided the federal issue, and rested its decision on federal grounds, rather than state law. As Chief Justice Hughes noted:

> jurisdiction cannot be founded on surmise . . . It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record. . . . that its decision of the federal question was necessary to the determination of a cause, and that it was actually decided.

Lynch v. New York Ex Rel Pierson, 293 U.S. 52, 54 (1934).

Because there is no opinion below, this Court should presume that the Illinois Supreme Court's refusal to entertain State Farm's request for extraordinary writ was an exercise of that court's discretion or a decision on matters of local practice. *See Adams v. Robertson,* 520 U.S. 83 (1997); *Street v. New York,* 394 U.S. 576, 582 (1969) (Harlan, J.). The presumption that the decision below was not made on a federal issue should be at its strongest when, as here, *see, e.g., infra,* n.10, 14, adequate and independent grounds — which were highlighted in Respondents' briefs to the Illinois Supreme Court — appear on the record, and there is no indication that the State court based its decision on federal law. *Herb v. Pitcairn,* 324 U.S. 117, 128 (1945); cf. *Lynumn v. Illinois,* 372 U.S. 528, 535 (1963).

C. This Court Should Decline To Reach Any Purported Federal Issues Before They Are Ripe.

Whether the issue is considered one of standing, *see, e.g., Warth v. Seldin,* 422 U.S. 490, 516 (1975); *Steel Co. v. Citizens for a Better Env't,* 118 S. Ct. 1003, 1016 (1998); avoidance of advisory opinions, *see, e.g., Herb,* 324 U.S. at 126; refusal to consider issues not ripe for decision, *see, e.g., Texas v. United States,* 118 S. Ct. 1257, 1259 (1998); or the respect for sister courts

required by our system of federalism. *See, e.g., Johnson v. Frankell*, 117 S. Ct. 1800, 1807 (1997), it is well established that this Court will not reach and decide issues prior to the necessity of their being decided. *See Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J. concurring). Each of these doctrines, compels the conclusion that this Court must decline to decide an issue that the state courts of Illinois have neither addressed (the choice of law issue) or which can be modified or overturned prior to the issue reaching this Court (the class certification and notice decisions).[10] Accordingly, none of the issues raised in State Farm's Petition is ripe for review, and the Petition should therefore be denied.

II. A REQUIREMENT OF MANDATORY INTERLOCUTORY REVIEW OF CLASS CERTIFICATION ORDERS IS FORECLOSED BY PRINCIPLES OF FEDERALISM.

Petitioner contends, without empirical or factual support, that defendants are *compelled* to settle large class actions once they are certified, and that therefore, "it is critical that the Court act now to review the class certification order rather than wait until after the trial on the merits." (Petition at 28.)[11] In other words, Petitioner

10. The Illinois Supreme Court also refuses to issue advisory opinions or entertain cases before they are ripe, *National Marine, Inc. v. The Illinois Env'n Protection Agency*, 639 N.E. 2d 571, 575 (Ill. 1994); *Simcox v. Simcox*, 546 N.E. 2d 609, 612 (Ill. 1989), which constitutes independent and adequate state grounds.

11. This contention is refuted by the *Snider* record (*see* Lodging App.); Plaintiffs are preparing for trial, not pressing for settlement. To support its claim that certification decisions are coercive, defendant cites to a single case, *Naef v. Masonite*, contending it is an example of a trend of coercive settlements that require a new rule of immediate interlocutory relief. These arguments are wrong. First, the undersigned counsel was one of Plaintiffs' counsel in the *Masonite* case. Rather than settling as a result of the class certification order itself, the defendant actually settled after defendant had availed itself of the opportunity for interlocutory review *via* petition for writ of mandate to the Alabama trial court, which was denied, *Ex Parte Masonite*, 681 So. 2d 1068 (Ala. 1996), *followed by a jury trial* that decided, after a four-week trial, that defendant's product had been defective. Second, the regional chauvinism and disdain for State courts that infects Petitioner's argument has no place in this Court's consideration. Petitioner's suggestion that the filing of class actions asserting

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argues that this Court should interpose itself to keep the class from trial because Petitioner might lose.[12] Respondents are charged with "forum shopping," as if this Court could or should rewrite the laws that entitle plaintiffs to file cases where they live against defendants who conduct business there. What rule would Petitioner have this Court impose that could remove *Snider* from its current venue? Petitioner can hardly claim surprise, prejudice or inconvenience with respect to *Snider*'s filing in Williamson County, Illinois. Petitioner has chosen to subject itself to Illinois venue laws, which provide for venue in any county in which a defendant does business; or, in the case of insurers, where an insured resides. *See* 735 ILCS 5/2-101, 2-103(e). Petitioner has long been headquartered in Illinois and does substantial business throughout the State. By its own count, Petitioner insures one in three Illinois

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state claims in certain State courts subverts due process is belied by the record and the facts of both *Masonite* and *Snider*. Nor is there basis for Petitioner's undifferentiated and offensive disparagement of State courts. As noted in Cabraser, "Life after *AmChem*: The Class Struggle Continues," 31 L.A. L. Rev. 373, 368-94 (1998) (from which Petitioner quotes a single sentence wildly out of context), State court experience with class actions predates the Federal Rules; moreover, "there is an entirely justified preference for State courts as class certification courts of first resort since these are courts of general, not limited, jurisdiction and must address the [state law] issues." *Id.* at 387. The certification of nationwide classes by State courts is hardly a novel or aberrant phenomenon, and this Court has upheld their propriety. *See, e.g., Shutts, supra*; *Sun Oil v. Wortman*, 486 U.S. 717 (1988). Illinois has a rich and well-developed body of class action precedent, and its class action rules are fully congruent with, and predate, those of the federal courts. *See* Forde, *Class Actions* (Ill. Inst. for CLE 1996).

12. This Court previously rejected Petitioner's fundamental argument that because it has chosen to break its contract and defraud many millions of individuals (rather than just a few people), it should be entitled to special procedural protections under the Due Process Clause. That a party's exposure to liability should be coextensive with the magnitude of its conduct constitutes the essence of Due Process, not its violation. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 34 (1987) (Stevens, J. concurring) ("The character of harm that may flow from this litigation is not different from that suffered by other defeated litigants . . . The price of even-handed administration of justice is especially high in some cases, but our duty to deal equally with the rich and the poor does not admit of a special exemption for multibillion-dollar corporations or transactions").

residents. Petitioner did not seek removal to federal court. Under current federal and state law, the Trial Court has, and has properly exercised, jurisdiction over Petitioner and the Respondent Class. Whatever the merits of Petitioner and Amici's policy arguments that this Court should somehow "federalize" all class action law, this case does not present an opportunity to consider the issue.

Noting the proposed amendments to Fed. R. Civ. P. 23 giving the federal courts of appeals ***discretion*** to hear appeals from the grantor denial of class certifications, Petitioner argues "[t]his wise change to the federal rules currently has no counterpart in most states, including Alabama, Illinois, and other magnets for class action litigation." Petition at 30. This argument is disingenuous. Rather than utilizing the provisions of Ill. Sup. Ct. Rule 308(a), to request the ***discretionary*** interlocutory relief Petitioner claims it was denied, Petitioner *voluntarily chose to bypass the available normal procedure for appellate review* and seek mandamus directly from the Illinois Supreme Court under the more stringent standard applicable to that relief. Only after having been rejected on its first end run to the Illinois Supreme Court did Petitioner approach the Trial Court and request leave under Ill. Sup. Ct. Rule 308 to review that Court's notice order and the December 5, 1997 certification order — in short, current Illinois state and federal practice are consistent and Petitioner had access to the relief it claims it was denied.

Petitioner in essence seeks an order from this Court legislating the mandatory review of class certification orders, something proposed Fed. R. Civ. P. 23(f) does not itself contemplate.[13] The imposition of such a requirement of interlocutory relief, or a ruling from this Court holding that it is an abuse of discretion not to

13. Proposed Rule 23(f) was submitted to Congress by this Court on April 24, 1998. It will provide as follows:

> (f) APPEALS. A court of appeals may *in its discretion* permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. *An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.* [emphasis supplied]

entertain direct interlocutory appeal to the state's highest court rather than an intermediate appellate court, would be at odds with prior decisions of this Court, and significantly upset the carefully crafted balance between federal and state courts. In *Coopers & Lybrand*, 437 U.S. at 476, this Court unanimously rejected Petitioner's argument and held that "[t]he Courts of Appeals have correctly concluded that orders granting class certification are interlocutory," *id.*, and that allowing mandatory appeals "involve questions of policy for Congress." *Id.*

For these reasons (which apply with equal force to State Farm's petition), this Court rejected the essence of Petitioner's argument: "the fact that an interlocutory order may induce a party to abandon his claim before final judgment is not a sufficient reason to consider it a 'final decision' within the meaning of § 1291." *Id* at 477. In so holding, this Court pointed to the availability of discretionary interlocutory review under 28 U.S.C. § 1292(b) — *which confers rights identical to those available under Ill. Sup. Ct. Rule 308(a)* — as the appropriate vehicle for review.

In *Johnson, supra*, this Court unanimously rejected the claim that a State court must allow mandatory interlocutory appeals of some federal issues, *id.*, 117 S. Ct. at 1805, and rejected the principle that a failure to entertain interlocutory appeals is 'outcome determinative,' noting that "the claim will be reviewable . . . after the trial court enters a final judgment, thus providing the petitioners with a further chance to urge their" claims. *Id.* at 1806.

Given that the Due Process Clause does not require Petitioner be afforded any appeal at all, *M.L.B. v. S.L.J.*, 117 S. Ct. 555, 566 (1996), the extensive opportunities for interlocutory relief Illinois has afforded Petitioner are far more process than is due.

III. THE TRIAL COURT DID NOT MAKE A CHOICE OF LAW DECISION AND THE CLASS IS CERTIFIABLE UNDER ILLINOIS OR MULTIPLE STATES' LAWS.

Asserting arguments not raised before the Trial Court,[14] Petitioner wrongly attacks a choice-of-law decision which the Trial Court *has not yet made*, and that the Trial Court *expressly reserved for decision at a later time*.[15]

1. The Trial Court's discussion of choice-of-law issues was strictly and properly limited to the issue of whether *variations in law might preclude certification of a class*. In determining they would not the Trial Court discussed *Shutts*, *supra*, and Illinois precedent that had applied the Illinois Consumer Fraud Act to the claims of out-of-state plaintiffs under *Shutts*.

Rather than presenting the Trial Court with relevant differences in state law, requesting that subclasses be created, or requesting *any ruling* on the choice-of-law issue, Petitioner instead sought mandamus from the Illinois Supreme Court. The arguments Petitioners and amici make to this Court are properly to be made,

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14. Before the Trial Court, State Farm relied exclusively on *Shutts, supra*, neither discussing *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), nor the Commerce Clause on which it now relies. Likewise, Petitioner failed to raise the McCarran-Ferguson Act, 15 U.S.C. § 1011 and much of the extensive material contained in the Petition at 12, n.7. Arguments not raised before a trial court, including constitutional challenges, are waived under Illinois law. *Texaco-Cities Service Pipeline Co. v. McCaw*, 695 N.E. 2d 481 (Ill. 1998); *The People ex rel. Hartigan v. The Illinois Commerce Comm'n*, 117 Ill. 2d 120, 131, 510 N.E. 2d 865, 869 (1987). Claims not properly raised in State court are not reviewable in this Court. *Illinois v. Gates*, 462 U.S. 213, 217-19 (1983). *Stembridge v. Georgia*, 343 U.S. 541, 547-8 (1952).

15. Petitioner does not contend that the Trial Court erred in finding that any eventual choice-of-law decision would not bar certification. Nothing in this Court's decisions, requires that the choice-of-law issue be conclusively determined at the time certification is granted. *Shutts*, 472 U.S. at 801. Instead, the Trial Court, looking at the facts of this case, determined only that choice-of-law issues would be manageable because Illinois would *likely* apply to all claims, and, if not, because a limited number of sub-classes could be created to address any variations of law.

if at all, to the Trial Court. Any class member or other person whose legal interests are affected by the choice of law determination may address this matter in the Trial Court at any time. Because there has been no final decision on this issue, this Court should reject Petitioner's request to interfere with the trial court's decision-making process and prematurely decide a constitutional issue. *See supra*, at 13-14.

2. Even if the Trial Court *had* decided to apply Illinois law to all class members' claims, its decision would have been fully consistent with *Shutts*. "There could be no injury in applying [forum state] law if it is not in conflict with that of any other jurisdiction connected to this suit." *Shutts*, at 816 (bracketed text added).

The Petition contains an extensive footnote which attempts to show — for the first time on appeal — the existence of true conflict of law.[16] Each of these purported conflicts is false, and does *not* trigger the need to make an interest determination under *Shutts*. The Massachusetts regulation cited by Petitioner requires the use of non-OEM parts only when such parts are "of like kind and quality," 211 CMR 1303-04(1). This presents *no* conflict, and

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16. Petitioner's argument, in effect, is that if such a conflict exists then application of Illinois law will undercut the principles of *BMW of North America, Inc. v. Gore*, 517 U.S. 557 (1995). This argument is based upon a false premise that the underlying lawsuit will *foreclose* use of non-OEM crash parts. Plaintiffs do not challenge the use of non-OEM crash parts other than to the extent that Petitioner has contracted to restore policyholders' vehicles to their "pre-loss condition" or to use parts of "like kind and quality." Nothing in the underlying lawsuit seeks to prohibit the use of non-OEM crash parts other than under Petitioner's current contractual language.

Gore is also distinguishable. *Gore* was not a multistate class action, as is this case, but an individual action brought by a single plaintiff. Rather than involving choice-of-law determinations, *Gore* concerned the permissible scope of punitive damages in a non-class case. Finally, unlike this case, *Gore* involved an arguable attempt by a State court to control defendant's conduct in other states whose residents or claims were not before the court or connected in any way to Alabama. Here, *all* plaintiffs' claims are fundamentally connected to Illinois because the misconduct emanates and is ultimately controlled from Illinois and *all* transactions between Petitioner and the class have an Illinois nexus.

instead raises the common fact issue which will be adjudicated on the merits by the Trial Court. Similarly, Hawaii's provision cited by Petitioner requires the availability of "a *like kind and quality part* of an equal or better quality than the original equipment manufacturer part only *if such part is available*." HRS § 431:1OC-313.6(a) (emphasis added). Again, this Hawaii regulation raises but does *not* answer exactly the same issues raised in this case: are non-OEM external body "crash parts" of like kind and quality to OEM parts? Neither State requires or even recommends the use of imitation parts if they are not equivalent to OEM parts.

Petitioner's reliance upon disclosure statutes to show a "true conflict" exists is similarly unavailing. The weakness of Petitioner's argument is demonstrated by its citation to Florida regulations in claiming that "some States permit the use of non-OEM parts even without disclosure." Petition at 12, n.7. 806 Fla. Admin. Cod. Ann. 4-166-027(10), reads in its *entirety*:

> No insurer shall require the use of replacement parts in the repair of an automobile unless the parts are at least equal in kind and quality to the original parts in terms of fit, quality, and performance.

This regulation raises no "true conflict," and in fact supports the Trial Court's determination that possible conflicts of law would not prevent certification of the class.

More generally, as the brief discussion of these regulations shows, a determination if true conflicts exist is an inherently fact-based inquiry which is not appropriate for resolution by this Court on the basis of a few misleading citations by Petitioner. *Shutts*, 472 U.S. at 823.

Finally, assuming, *arguendo*, that true conflict exists, Illinois law may nevertheless be constitutionally applied to all Plaintiff's claims. If a true conflict exists, the state's substantive law can be constitutionally applied if "that State [has] a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is either arbitrary or fundamentally unfair." *Shutts* at 818 (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-313 (1981)). Not only is Petitioner headquartered in Illinois,

but the relevant contract language, fraudulent practices, practice of using non-OEM parts, and control over the policy of non-OEM parts use originated in, was directed from, and was implemented through State Farm executives located in, and operating from, the State of Illinois. This conduct "implicates the legitimate interests of the State of Illinois in ensuring that persons and entities within its jurisdiction . . . [act] in accordance with its law." (Pet. App. at 11a.) It is also *not* unfair, arbitrary, or beyond "the expectation of the parties," *Shutts*, 472 at 822, that Illinois law might be applied to all claims against Petitioner; State Farm should reasonably expect that Illinois law may control a case involving an Illinois insurance company and conduct which emanated from Illinois.

IV. THE TRIAL COURT'S DECISION TO CERTIFY THE CLASS RAISES NO FEDERAL QUESTION.

Based upon review of an extensive factual record, and its application of the correct law to those facts the Trial Court found that the litigation should be managed as a class action, and should ultimately be tried on a class basis. Petitioner now seeks to relitigate this non-final decision before this Court. *See* 735 ILCS 5/2-802. Because the discretionary certification decision of the Trial Court raises no substantial federal question, this Court should deny review. *See Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg*, 396 U.S. 367, 367 (1970); *Wolf v. Weinstein*, 372 U.S. 633, 636 (1963).

1. The decision to certify, or not to certify, a case is discretionary and inherently fact-specific. *Wright v. Stone Container Corp.*, 524 F.2d 1058, 1061 (8th Cir. 1975). Petitioner improperly requests *de novo* by this Court to the Trial Court's factual findings regarding certification. Such relief is not available. *Sperry Rand Corp. v. Larson*, 554 F.2d 868, 873 (8th Cir. 1977).[17]

17. This Court "is not, and never has been, primarily concerned with the correction of errors in lower court decisions." Address of Chief Justice Vinson before the American Bar Association, September 7, 1949, 69 S. Ct. v, vi. *See also United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a *certiorari* to review evidence and discuss specific facts.").

2. Petitioner's principal challenge to the State court's trial certification decision rests on State Farm's assumption that it will prevail on the merits, *i.e.*, that Plaintiffs will not be able to prove at trial that non-OEM crash parts are categorically inferior and sub-standard, and, that the case is therefore not manageable. The Trial Court rejected this argument based upon the factual submissions of both parties. (Pet. App. at 10a, 15a.)

In arguing the Trial Court erred in deciding this case could be tried by Plaintiffs on the basis of classwide proof, Petitioner fails to inform this Court that at least two courts, including one in Illinois, have certified state-wide classes involving exactly the same issues which were certified in this case for trial against *this same Defendant*.

More generally, Petitioner's argument on manageability rests on irrelevant cases decided in unrelated factual situations. Here, the Trial Court was presented with sufficient classwide proof that State Farm's form contracts and actual practices were standard, and that Plaintiffs can rest their case on common evidence that the non-OEM crash parts at issue are inferior. This decision neither erred nor raises a substantial federal question suitable for review by this Court.

The appropriateness of certification in cases like this for trial through class-wide proof was most recently recognized in *Cope v. Metropolitan Life Insurance Co.*, 696 N.E. 2d 1001 (Ohio 1998) in which the Ohio Supreme Court reversed the trial and appellate courts' rulings denying class certification, rejecting the contention that "individualized proof" or "individualized scrutiny of each transaction" would be necessary to determine each claim. *Cope* restates the prevailing view of the federal and State courts in the consumer context:

> Courts generally find that the existence of common misrepresentations obviates the need to elicit individual testimony. . . . They recognize that when a common fraud is perpetrated on a class of persons, those persons should be able to pursue an avenue of

> proof that does not focus on questions affecting only individual members.

Id. at 1004 (citing federal cases). As *Cope* also noted:

> Courts also generally find that a wide variety of claims may be established by common proof in cases involving similar form documents or the use of standardized procedures and practices.

Id.; *see also AmChem*, 117 S. Ct. at 2250; *In re: Prudential Ins. Co. Am. Sales Practices Lit. Agent Actions*, 1998 U.S. App. LEXIS 17057 *92-93 (3d Cir. 1998); *cf. Bazemore v. Friday*, 478 U.S. 385, 398 (1988). Rejecting the argument Petitioner makes in this case, one court recently noted,

> considering the facts of the case presented, a claim will meet the predominance requirement when there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position.

Lockwood Motors, Inc. v. General Motors Corp., 162 F.R.D. 569, 580 (D. Mn. 1995).

Class certification in this case will enhance due process by allowing individuals who could not otherwise challenge Petitioner's uniform practice of specifying inferior non-OEM parts in the repair of their vehicles to seek recompense. *See AmChem*, 117 S. Ct. at 2246 (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997). ("The policy at the very core of the class action mechanism is to overcome the problem that when small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.").

Petitioner now argues that due process is abridged by a trial court's decision to try a case on a class basis. This argument attempts to prove too much. A class certification order properly prevents Defendant from usurping Plaintiffs' prerogative to choose the method of proof of their claims. Only if sufficient class-wide proof is presented at trial to show that State Farm's specification of the

non-OEM crash parts at issue cheats policyholders or constitutes a breach of its contract, will the Class prevail. Defendant is not prevented from showing its practices are proper or justified. The class certification decision in no way deprives Petitioner of its right to a defense; it merely frames the issues relevant to Plaintiffs' case in chief.

The cases cited by Petitioner, without regard for their holdings or context, entirely fail to support Petitioner's argument that the class action device, by allowing class-wide proof, violates due process. *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) and *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971), stand for the principle that an individual has a right to *make its arguments to a court*; they do not require the court to allow an individual to continue to argue a discredited point once the court has ruled.

As with decisions to exclude evidence, see *United States v. Scheffer*, 118 S. Ct. 1261 (1998), or expert testimony, *see GE v. Joiner*, 118 S. Ct. 512 (1997), no due process principle allows Petitioner to require the opposing party to present evidence or proof the Trial Court found inadmissible and irrelevant. *See* Fed. R. Ev. 401, 402. In fact, the express power to do, what State Farm claims the certification order did as a matter of fact — exclude irrelevant issues as a "waste of time" — is expressly granted to trial courts by Fed. R. Ev. 403. Simply put, there is nothing in the process of allowing a Plaintiff Class to attempt to prove its claims by common, rather than individual proof, that violates any principle embedded in the historical meaning of the Due Process Clause. In any event, no evidence or defense has been excluded, since the trial has not yet taken place!

V. IN APPROVING THE CLASS NOTICE PROGRAM THE TRIAL COURT CORRECTLY APPLIED ILLINOIS PRECEDENT AND THE DUE PROCESS RULINGS OF THIS COURT TO ITS FACTUAL FINDINGS.

Petitioner's notice argument has two primary defects: (1) Petitioner incorrectly assumes — contrary to the trial court's findings — that mailed notice is practicable or effective under the circumstances of this case, where the only record of class member

addresses is inaccurate and out-of-date; and (2) Petitioner assumes that regardless of the ineffectiveness of mailed notice, mailed notice must always be given in lieu of a demonstrably more effective published notice campaign, as if the "best practicable notice" standard mandated a slavish commitment to *form* rather than *result*.[18]

To meet the "best practicable" notice standard, under the particular circumstances of the *Snider* action, Plaintiffs submitted a comprehensive fifty-six page notice plan supported by evidence as to its "reach"[19] and effectiveness. The Plan has been implemented. It consisted of three elements:

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18. Because Petitioner must "have suffered an 'injury in fact' — an invasion of a legally protected interest which is (a) concrete and particularized. . . . and (b) 'actual or imminent,' not 'conjectural' or 'hypothetical.' " *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations omitted) and no such injury exists in this case, Petitioner lacks standing to assert rights of class members to a particular *form* of notice. Petition's citation to *Shutts* in an effort to show standing fails to note that this Court allowed defendant to raise the claim that the *court did not have jurisdiction over* members of the *plaintiff class*, *Shutts*, 47 U.S. at 806, such that any judgment in defendant's favor would have been a nullity — a concrete injury. Because the right to opt out is personal to the individual and opt-outs do not have the right to pursue competing class actions, *Hanlon v. Chrysler Corp.*, 1998 U.S. App. LEXIS 11957 at 25 (9th Cir. 1998), the only harm that Petitioner *potentially* faces is the *risk* that, if Petitioner succeeds on the merits, an *individual* might argue that notice was inadequate and — assuming that she could convince a court that: (1) she had no actual notice; (2) if mailed notice had been sent, she would have received it; and (3) would then have exercised her opt-out rights — file an *individual* claim. As a practical matter, the doctrine of collateral estoppel would likely bar any such individual claims, *Hansberry v. Lee*, 311 U.S. 32 (1940), and given the small size of the individual claims at issue in this lawsuit, the threat of harm Petitioner claims is at best merely "hypothetical." *See AmChem*, 117 S. Ct. at 2246.

19. In marketing/communications parlance, "reach" is a term of art referring to the ability of a message to be actually read or heard by the intended recipient. By contrast, the fact that a mailed notice may (or may not) be placed in an addressee's mailbox does not demonstrate that it has actually "reached" (been opened or read by) that person. To the contrary, evidence developed by the U.S. Postal Service through their household diary study, presented by Plaintiffs, unrefuted by Defendant, and noted by the trial court, showed that 46.6% of official and governmental mailings are not read immediately, completely and/or are discarded unread.

First, the Plan included a nationwide publication plan which placed the notice in publications targeted to reach the highest number of class members. Notice was placed in major magazines, as well as *over* 850 newspapers nationwide. (Pet. App. at 23a.) The notice was prominently placed in the main news section in readable type with eye-catching headings. (Hilsee Aff. at 6.) *Second*, the plan generated news coverage of the lawsuit and the opt-out deadline. (Pet. App. at 23a.)[20] *Third*, the plan involved placing notice on the Internet at a dedicated website promoted via placement on all major Internet search engines and through Banner advertising. (*Id.*)

In support of this comprehensive multi-part notice plan Plaintiffs presented expert testimony and scientifically verifiable figures that the notice program would "reach" at least 76.4% of the class members. (*Id.* at 24a.) As implemented, the notice plan reached over 78% of class members. (Notice Impl. Aff. at ¶ 6.)

Petitioner proposed a notice plan, rejected by the Trial Court, that relied on mailed notice to an inaccurate list of names. Petitioner suggested that notice be mailed to one of two alternate lists: (1) an admittedly grossly *under-inclusive* list that contained 1.8 million names and addresses, some substantial portion of whose addresses were outdated and incorrect, (Pet. Aff. at 26a); and (2) an admittedly grossly over-inclusive list of nearly 19.1 million State Farm policy holders, only a small portion of whom were class members, and many of whose addresses were also inaccurate. (*Id.*)

In deciding what notice to provide, the Trial Court indicated its assessment of the credibility of Respondent's submissions, noting that their notice expert's testimony was credible, (*id.* at 24a), and then that the data presented to the court to show that the notice plan would have a 'net reach' of at *least* 76.4% of the potential class members were "supportable and verifiable." (*Id.*) The Trial Court determined that Petitioner's claims (now renewed before this Court) were factually not credible. (*Id.* at 25a.)

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20. Those efforts were fully implemented, resulting in at least 6,197 articles and broadcast appearing, thereby reaching a total audience of over 36,600,000 people. (Notice Impl. Aff. at ¶ 6.)

The Trial Court found that "*State Farm has not presented, and is not able to present, a reasonably accurate list of potential class members from its records,*" *(id. at 27a)*, or "any scientifically verifiable facts which indicate that the reach of their proposed mailing (if it could be done accurately) and limited publication notice plan equals or surpasses the reach of Plaintiffs' Notice Plan." *(Id.* at 27a.) Petitioner asks this Court to disregard Petitioners' own submissions below, and the Trial Court's carefully factual findings, to independently declare that the Trial Court's determinations of credibility and its weighing of the evidence was erroneous, and to simply substitute the findings Petitioner sought, but could not support, below, for those the Trial Court made.[21]

In requesting review of these factual determinations, Petitioner raises no substantial Federal Issue nor does it cite to *any* evidence the Trial Court ignored, or *any* flaws in its reasoning. Rather, Petitioner claims that the Trial Court's "principal rationale was its conclusion that mailed notice would be no more effective than publication notice" in all cases. Petition at 22. The court below found that the specific notice plan submitted by respondents was more effective than the mailed notice plan *submitted by Petitioner*, which called for mailing to an inaccurate and incomplete list of individuals, and thus was not reasonably calculated to reach the members of the class under the particular circumstances of this case.

In deciding the notice issue, the Trial Court expressly considered *Mullane v. Central Hanover Bank & Trust Co.*, 339

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21. This Court's usual practice is to "defer to state-court factual findings, even when those findings relate to a constitutional issue." *Hernandez v. New York*, 500 U.S. 352, 366 (1991). The presumption of correctness of a trial court's factual findings is especially strong when, as in this case, those findings "are based on determinations regarding the credibility of witnesses." *Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985). When this Court reviews judgments which are truly final, as this judgment is not, it has the benefit afforded by a review of the record by both the trial court and one or several appellate courts and need not consider the factual issues "absent the most exceptional circumstances." *Branti v. Finkel*, 445 U.S. 507, 512 (1981); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987).

U.S. 306 (1950), and *Shutts*, *supra*, and found that due process required the flexible notice requirement, also embodied in Illinois decisions, which required the best notice practicable given the unique circumstances of this case. (Pet. App. at 29a.)

Petitioner cites to *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), and other cases (Petition at 22-23) for the erroneous proposition that notice by mail is always required, regardless of the facts of a case. However, the cited quotes from *Eisen* (and the other cases cited by Petitioner) stand for a different proposition: that "notice by publication has long been recognized as a poor substitute for *actual* notice." *Id.* 417 U.S. at 175 (emphasis added).[22] It is, of course, self-evident that there may be a considerable difference between *actual notice* and even the best practicable notice available in a case, whether that notice is mailed or published. It is the latter, not the former that is required. *Shutts*, 472 U.S. at 812.

In each case Petitioner cites to support its *per se* preference for mailed notice, there were *two* major differences from the comprehensive notice published in this case. First, in each, "tombstone" notice was buried in the back of a newspaper — in effect a notice designed *not* to give actual notice, to "reach" the class, or to be read. *Mullane*, 339 U.S. at 315. *See Walker v. City of Hutchinson*, 352 U.S. 112, 113(1956); *City of New York v. New York, New Haven & Hartford RR Co.*, 344 U.S. 293, 294 (1953); *Mullane*, 339 U.S. at 309. Here, by contrast, the notice

22. The Trial Court committed no error in relying upon decisions of the Illinois Supreme Court in *Frank v. Teachers Ins. Annuity Assoc. of America*, 71 Ill. 2d 583, 594 (1978) and other courts that *Eisen* was neither constitutionally based, nor required notice via mail to the inaccurate and incomplete list petitioner presented to the Trial Court. Petitioner's contention that *Eisen* is constitutionally binding is belied by the language of that case and by how it was cited by this Court in *Shutts*. *Shutts* based its requirement as to what notice was constitutionally required under the Due Process Clause in multi-state class actions squarely upon this Court's holding in *Mullane*. *See Shutts*, 472 U.S. at 812 (quoting *Mullane*). In his opinion for the Court, then-Justice Rehnquist merely cited to *Eisen* as a "cf' citation, suggesting it was not direct support as to what notice was constitutionally required. The *Eisen* opinion itself repeatedly makes crystal clear that its decision rested upon the requirements of Rule 23, not Due Process. *See, e.g.*, *Eisen*, 417 U.S. at 172, n.10, 172-73, 177.

was placed prominently to catch class members' attention and was distributed nationwide with multiple opportunities for class members to read it. Second, unlike here, the *actual* address of the person sought to be reached in each case cited by Petitioner was *known*. *See Walker*, 352 U.S. at 116; *City of New York*, 344 U.S. at 296; *Mullane*, 339 U.S. at 318. Petitioner's cases are therefore inapposite.

It is not the selection of a particular *medium* of notice (*e.g.*, mail) that is essential, but the selection of the *most effective* medium of notice that is practicable in a particular case. *Shutts*, 472 U.S. at 812 (" 'The notice must be the best practicable 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' *Mullane*, 339 U.S. at 314-315.")

Rejecting the *per se* rule petitioner advocates one court noted:

> Here — for all the reasons previously noted — all we know is that among the 70,000 addresses there will be a substantial number of class members. As for the rest — perhaps as many as half— the mailing is an idle act. . . . *Neither due process nor the integrity of the class action process demands such useless and wasteful procedures.*

Cartt v. Superior Court, 124 Cal. Rptr. 376, 381 (Cal. App. 1975) (emphasis added); *In re Domestic Air Antitrust Litigation*, 141 F.R.D. 534 (N.D. Ga. 1992).

At bottom, the rule proposed by Petitioner fails to comport with the essential (and common sense) holding of *Mullane* that "the means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id.* 339 U.S. at 315. Basing notice on a mailing list containing significant inaccuracies would never be the means employed by one reasonably desirous of actually reaching a group of individuals, especially if the list only contained a small portion of the individuals sought to be reached, as did the list rejected by the Trial Court. Indeed, the mailing list Petitioner presented to the Trial Court is the functional and due process equivalent of the published notice

rejected by this Court in *Mullane*. Based upon the Trial Court's factual determinations, this Court's precedent, and common sense, this Court must decline Petitioner's invitation to relitigate these pretrial procedural determinations by the Trial Court.

CONCLUSION

The Court should deny the petition for a writ of *certiorari*.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE SUPREME COURT OF ILLINOIS DATED JANUARY 21, 1998

Supreme Court of Illinois

January 21, 1998

No. 84639
No. 84640

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Petitioner,

SUZANNE M. KRUSINSKI, ET AL.,

Respondents.

THE COURT HAS TODAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

This cause coming to be heard on the motions of the movant, State Farm Mutual Automobile Insurance Company, responses having been filed by respondents, replies having been filed by the movant, and the Court being fully advised in the premises;

There being sufficient votes to allow or deny any of the motions, the Court takes no action on the motions.

Chief Justice Freeman, Justice Miller, and Justice McMorrow would have allowed the motion to transfer and consolidate, and the motion to stay.

Justice Bilandic took no part in these cases.

APPENDIX B — TRANSCRIPT OF PROCEEDINGS DATED FEBRUARY 26, 1998

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT WILLIAMSON COUNTY, ILLINOIS

No. 97-L-114

JEANNE M. TETER TAMMY SNIDER, and MICHAEL E. EVERY, On Behalf of Themselves and All Others Similarly Situated,

Plaintiffs,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant.

REPORT OF PROCEEDINGS

Report of proceedings of the motion hearing before the Honorable John Speroni on February 26, 1998.

APPEARANCES:

FOR THE PLAINTIFFS:
G. PATRICK MURPHY

FOR THE DEFENDANTS:
KENT BRANDON

Jennifer J. Young, CSR
Williamson County Courthouse
Marion, Illinois 62959
CSR# 084-003584

Appendix B

THE COURT: The Court is going to call to order Case number 97-L-114, Snider et al., versus State Farm. Present in open court is Attorney Patrick Murphy representing the Plaintiffs and Attorney Kent Brandon on behalf of the Defendants, State Farm.

The court would note for the record that yesterday — yesterday being February 25th C the Court entered an order setting the exclusion request deadline, approving the form of notice of class certification, and directing the implementation of the notice plan.

After the Court entered the order and the order was filed with the clerk, State Farm filed several motions, two of which specifically being the motion for reimbursement of discovery costs and the motion to redact portions of its data bases or, in the alternative, for in camera review of opinion work product, don't have anything to do with the matters we are here on today, nor does a motion to continue trial dates, which was filed.

Another motion, however, is entitled motion for leave to respond to Plaintiffs' new notice submissions and the — excuse me — stay the effects of any order providing for publication on the class in the pending presentation of Rule 308 motion.

This morning when I arrived at the courthouse, my secretaries advised me that there had been a request for a hearing this morning. And thereafter, State Farm filed a motion — when I say "this morning", it's February 26, 1998 — State Farm had filed a motion entitled State Farm's motion to certify for interlocutory appeal requests regarding class certification and notice, and, Two, to stay proceedings. And that is the motion the Court believes the parties wish to proceed on or have asked the Court to hear today.

Appendix B

Before we proceed to arguments, Mr. Brandon, as I would read State Farm's motion for leave to respond to Plaintiffs' new notice submissions and to stay the effects of any order providing for publication on the class in the pending presentation of the Rule 308 motion, I would see that motion as moot at this point since the Court had already ruled before the motion was filed, and since apparently we are here already on a 308 motion.

MR. BRANDON: I believe that's correct, Your Honor.

THE COURT: Well, the Court then from the bench is simply going to rule on that motion and deny it as moot.

Are there any other housekeeping matters we need to take up before we hear arguments on the motion filed today to certify for interlocutory appeal certain questions? Mr. Murphy?

MR. MURPHY: No.

THE COURT: Mr. Brandon?

MR. BRANDON: No, Your Honor.

THE COURT: All right. Mr. Brandon, I'll hear State Farm's arguments on the motion to certify interlocutory appeal certain questions.

MR. BRANDON: May it please the Court, I believe the Court has accurately stated the procedural history at this point. I would say this, Your Honor, however. There was some indication in the prior order of the Court that the Court was planning to — that the parties should assume the Court was going to rule by February 27th. And I think based on that,

State Farm, without knowing that the Court had entered this order on the 25th, had prepared and was going to hand deliver to the Court the motion which the Court has now indicated is moot. And State Farm had prepared that motion and was going to file it prior to the time that the Court had ruled. And when I arrived at the courthouse, of course, I received — I filed my motion then proceeded to the judges' secretaries desk where I obtained the order of the Court.

So procedurally, the motion did become moot, but State Farm was not aware of that.

THE COURT: The reason I did the 27th, just for clarity, I wanted to give myself as much as time as possible. My schedule today and tomorrow was pretty open, but I managed to work on it earlier and got it done.

MR. BRANDON: I understand, Your Honor. I'm just saying that the time sequence was very close together.

THE COURT: It was. It was.

MR. BRANDON: In regard to the motion that State Farm is filing now, I think it has real similarities to the one that was filed yesterday. And basically I think the motion is self-explanatory. State Farm seeks from the Court the opportunity to file — to pursue a Rule 308 procedure and is requesting this Court to certify for immediate interlocutory appeal the notice question. And we want to do that.

We also give the Court an opportunity to consider this motion. And the problem that we have in the order the Court entered yesterday by the Court, in Paragraph 31, that order

specifically finds that the notice campaign is so to commence upon the entry of this order.

Now, I take that to mean it would commence as soon as the order was entered on February 25th. That being the case, State Farm has no opportunity whatsoever to come into court and request of the Court consideration under Rule 308 and to certify this. And I think that by denying State Farm that opportunity, it creates a prejudice on the part of the company.

I think in this particular case that once this notice starts and the campaign begins, then it's going to be very difficult to stop that. It's kind of like trying to unring the bell, so to speak. And I think at least State Farm should have the opportunity to present to the Court its 308 request to have this matter certified interlocutory appeal. And asking for a brief amount of time to do that certainly would not be prejudicial to the Plaintiffs.

This case is not set for trial for nearly a year. I think it's set on February 1st of 1999. The time frame that's built into the Court's order allows an opt-out date of June 5th of 1998, which is more than 90 days away. And if for whatever reason the Court should have made an incorrect ruling and the Appellate Court should see fit to alter it in any way or to reverse the Court's ruling, then the damage of State Farm has been done.

If the Appellate Court, after considering the 308, decides the Court is correct, the matters can proceed accordingly. But by not giving State Farm the opportunity to present the 308 and having things go forward without any possibility of the 308 request puts State Farm in a very difficult position.

And I think that this particular case certainly does meet the requirements of Supreme Court Rule 308. The issue we are

talking about here that was certification of the class involves a question of law to which there is a substantial basis for a difference of opinion. And one of the things we presented to the Court is a ruling by a judge in Cook County, a ruling in a case involving Allstate where it's quite similar to this case, where he found that he wouldn't certify the class.

And it's just an example that there might be a difference of opinion here. And certainly the way this case has progressed I think has demonstrated to the Court that there is a substantial difference of opinion. And State Farm on other occasions presented to the Court a ruling in the *Deans* and *Sessions* cases regarding this same matter.

THE COURT: MR. Brandon, excuse me for interrupting. But just as a point of clarification, are you asking for additional time to present the 308 motion? Because what was filed today, as I read it, is State Farm's motion to certify the interlocutory appeal and also a memorandum in support of State Farm's motion to certify for interlocutory appeal the class certification and notice issues. It's a 13-page brief.

MR. BRANDON: No. I'm sorry. I don't mean to imply we want more time to present the motion. That was the yesterday motion.

THE COURT: I just wanted to make clear —

MR. BRANDON: We are just trying to establish — what I am doing, hopefully now, is establishing to the Court the reason why this is an appropriate 308 motion based on the statutes.

THE COURT: All right. Because that's what I understood we were —

MR. BRANDON: Exactly. Exactly.

THE COURT: And that's why I gave you guys, in essence, an emergency setting this morning.

MR. BRANDON: That's correct, Your Honor. But as I indicated, we have attached for the Court's benefit a ruling from the Cook County's *Allstate* case where a judge there came to a different conclusion than the Court did in this case.

And we have also presented testimony and evidence regarding the finding, I believe, in the *Deans* case in Tennessee which also is not certified.

In this particular case, an immediate appeal from this order would materially advance the ultimate termination of litigation. If this — if the Appellate Court should decide that this class was not properly certified, that would have the effect of basically ending this litigation. So the requirements of 308, I believe, are present here.

You have got a question of law where there could be a substantial difference of opinion. And we have demonstrated that to the Court. And you have got a situation where if the Appellate Court were to in any way alter your ruling or to reverse it, it would materially advance the ultimate termination of litigation. I think that the essence of our arguments are contained in the motion and in the memorandum which we have filed.

But basically State Farm believes that by not giving it the opportunity to take the interlocutory appeal, that its rights are being very prejudiced in this case. And by the same token, I

don't think the Plaintiffs' rights would be prejudiced, because we would get a result which we would all then know whether or not this case should go forward.

So for this reason, State Farm is requesting that the Court immediately certify this case for interlocutory appeal on the questions presented here pursuant to Supreme Court Rule 308.

THE COURT: MR. Murphy?

MR. MURPHY: Your Honor, yesterday at, I believe it was, five o'clock Pacific time, we, in fact, implemented the notice program. We are now contractually committed, and money is spent, and it is under way. That's just a fact.

Now, as to the 308 matter, as Your Honor knows, that's well within the discretion of the trial court. We are very comfortable with the fact that the Court's orders are correct on both issues well within the discretion of the trial court.

There really is no substantial dispute here as to what the law is. Elizabeth Cabraser did the research herself on the issue of what notice is required under these circumstances. And it is reflected in our submissions. And we think so much of her research and your order that we have irrevocably committed ourselves to that particular course of action.

There is no reason to give State Farm a special appeal in this case. They will from time to time apply to you or any other judge they can find anywhere for some kind of special relief as they have shown in the past. That's just going to happen. As we speak, we have people waiting at the Supreme Court because we expect that they will probably make an application to the

Supreme Court. And we have people in Cook County waiting for them. But that's just going to happen.

But the bottom line here is there just really isn't any issue that deserves this special treatment. We very carefully researched the issue. I know Your Honor read it, because I read your order. And there is no reason to give them this special relief. And the only thing I want to make very clear for the record — and Mr. Brandon wasn't here, so he didn't get the full flavor of what's happened. And I'm sure he is thankful he wasn't — in their memorandum they keep speaking of our new notice submissions. We have not made any new submissions. Your Honor ordered us to file on the 20th a proposed order containing conclusions of law and finding of facts. And that's just exactly what we did. And we gave them a copy of it.

So any suggestions in their memos and their arguments that we have snuck something in on them or done something, which is the flavor of what they are saying, is just wrong. We have not done any of that. We did exactly what we were ordered to do.

So I am not going to take any more of your time. The motion for 308 certification should be denied. There is nothing special here that deserves this treatment. And we are irrevocably committed as of yesterday to the notice plan. It's under way right now.

THE COURT: Mr. Brandon, any follow-up?

MR. BRANDON: I do not, Your Honor.

THE COURT: The Court is going to take a recess. I have started reading the memorandum in support of State Farm's motion

to certify for interlocutory appeal questions regarding class certification and notice and the — and to stay proceedings. I want to take the time to read that carefully and look at any law that I need to look at. And I'll come back as soon as I can and rule on the record on State Farm's motion to certify the questions for interlocutory appeal. Where will you gentlemen be so that —

MR. MURPHY: Could I address the Court on that, Your Honor?

THE COURT: Certainly.

MR. MURPHY: I know Mr. Brondon has to fly. If he needs to run. If he needs to run. If he would authroize me, I would advise him of the — I mean, I would wait and then advise your office exactly what the Court did today.

THE COURT: Mr. Brandon, what time does your plane leave?

MR. BRANDON: I'm not on an airplane. I am on a drive to St. Louis.

THE COURT: And your deposition is at two o'clock?

MR. BRANDON: Yes.

THE COURT: So as long as you left by 11:30?

MR. BRANDON: I think that would be fine.

THE COURT: It's ten minutes until 10:00. And I think I could get through things in 30 or 45 minutes, an hour or so.

MR. BRANDON: I don't want to rush the Court.

THE COURT: I am not. I have read Rule 308 before. So I'll see what cases you have. And believe me, I'll take whatever time I need. If it runs into more time, it just will. We will be in recess. I'll be back in, and we will have our ruling.

MR. BRANDON: Thank you, Your Honor.

(At which point in the proceedings a break was taken.)

THE COURT: Back on the record in 97-L-114, Snider, et al., versus State Farm. The Court heard arguments on State Farm's motion to certify for interlocutory appeal questions regarding class certification and notice, and, Two, to stay proceedings earlier today.

The Court has now read the motion and read State Farm's memorandum in support of State Farm's motion to certify for interlocutory appeal questions regarding class certification and notice, and, Two, to stay proceedings. The Court would note for the record that Attorney Brandon and Attorney Murphy are present in Court.

The Court, having read the motion and memorandum, having done its own research both yesterday and today, and considering the record in this case, is ready to rule on the motion.

The statute involved in an interlocutory appeal is Supreme Court Rule 308. 308(A) provides when the trial court, in making an interlocutory order not otherwise appealable, finds that the order involves a question of law as to which there is substantial grounds for difference of opinion and that an immediate appeal

from the order may materially advance the ultimate termination of litigation, the Court is to so state in writing and identify the question of law involved. And that triggers the procedure for the Appellate Court to decide whether or not it wished to hear the interlocutory appeal.

Both of the matters raised by State Farm, the issue of class certification and the notice and notice plan are, in the Court's mind, interlocutory orders not otherwise appealable. So Rule 308 applies.

The Court would note that its class certification order was initially entered in this case on December 5th, 1997. State Farm in its memorandum filed today states and cites cases that the issue of class certification is the most significant decision involved in a class action lawsuit.

In the almost three months since this class was certified, there has not been any request for a Rule 308 appeal by State Farm or really any inkling given to the Court that any such request would be made. We are now eleven months away from the scheduled trial date in this case, and the Court, from what it has just seen concerning filings in the record of deposition notices and the discovery matters the Court has been called to rule upon already finds that significant resources have already been expended. And Attorney Murphy earlier today in open Court advised the Court that the notice plan which was ordered by the Court was contractually bound, if I remember the time correctly, at five o'clock Pacific Standard Time yesterday.

Of course, all the issues — all — both of the issues that State Farm requests for interlocutory appeal can, of course, be decided by direct appeal after trial. These issues of interlocutory

appeal can really come up in every case. In fact, every time a Defendant files a motion to dismiss, the issue becomes or could become whether or not an interlocutory appeal is appropriate.

The Court believes the case indicates it's something that should be sparingly used, but should be used in an appropriate case. So the Court, having read State Farm's motion seeking an interlocutory appeal and the memorandum, having done its own research and considered the entire record and proceedings in this case does not find that there is a question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of litigation. And State Farm's motion is denied in all respects.

Anything further from the Plaintiffs or the Defendants?

MR. MURPHY: No.

MR. BRANDON: No, Your Honor. Thank you.

* * * END OF PROCEEDINGS * * *

APPENDIX C — RECORD SHEET

(Omitted here but printed separately as Lodging Appendix)

APPENDIX D — COURT-ORDERED CLASS ACTION NOTICE

If you have had vehicle repairs under your State Farm auto insurance policy, this notice may affect your rights.

Please read this Court-ordered Class Action Notice carefully.

In the Circuit Court for the First Judicial Circuit, Williamson County, Illinois, a lawsuit is now pending titled: *Tammy Snider and Michael Avery, on behalf of themselves and all other similarly situated, Plaintiffs, vs. State Farm Mutual Automobile Insurance Company, Defendant, No. 97-L-114.* This Notice is directed to all members of the Plaintiff Class, defined as: **All persons in the United States, except those residing in Arkansas and Tennessee, who (1) were insured by a vehicle casualty insurance policy issued by Defendant State Farm and (2) made a claim for vehicle repairs pursuant to their policy and had non-factory-authorized and/or non-OEM (Original Equipment Manufacturer) "crash parts"* installed on their vehicles or else received monetary compensation determined in relation to the cost of such parts.**

---

*"Crash parts" are vehicle components typically repaired or replaced as a result of crash damage rather than as a result of normal vehicle usage. The non-factory-authorized and/or non-OEM crash parts involved in this Plaintiff Class are of the following types: 1) fenders, 2) hoods, 3) doors, 4) deck lids, 5) luggage lid panels, 6) quarter panels, 7) rear outer panels, 8) front end panels, 9) header panels, 10) filler panels, 11) door shells, 12) pickup truck beds, box sides, and tail gates, 13) radiator/grill support panels, 14) grilles, 15) head lamp mounting panels/brackets/housings/lenses/doors, 16) tail lamp mounting panels/brackets/housings/lenses, 17) outer body mouldings, 18) door body side moulding, 19) front wheel opening mouldings, 20) side mouldings, 21) front and rear fascias, 22) outer panel mounting brackets, supports and surrounds, 23) bumpers (excluding chrome bumpers), 24) bumper covers/face bars, and 25) bumper brackets/supports.

Appendix D

Excluded from the Class are employees of Defendant State Farm, its officers, its directors, its subsidiaries, or its affiliates. In addition, the following persons are excluded from the Class: (1) persons who resided or garaged their vehicles in Illinois and whose Illinois insurance policies were issued/ executed prior to April 16, 1994, and (2) persons who resided in California and whose policies were issued/ executed prior to September 26, 1996.

Notice of this lawsuit is given pursuant to Illinois statutes, and by order of the Court, to inform you of the Court's decision to certify a Plaintiff Class, the nature of Plaintiffs' claims, and your right to participate in or exclude yourself from the Class.

Individual and representative Plaintiffs Tammy Snider and Michael Avery have been appointed by the Court to function as representatives of the Plaintiff class. Plaintiffs' claims concern the contractual language contained in standard form State Farm automobile insurance policies issued nationwide, which, either obligates State Farm to restore a policyholder's vehicle to "its pre-loss condition" after an accident, or to "pay to repair or replace the property or part with like kind and quality." While State Farm has designed form policies specific to each state, the contractual obligations at issue in this case are stated in substantially identical form in State Farm policies issued nationwide.

Under this contractual language, State Farm uniformly specifies the use of certain non-original equipment manufacture ("non-OEM") replacement parts (referred to as "quality replacement parts" by State Farm and "imitation parts" by Plaintiffs) when these parts are available and priced lower than original equipment manufacturer's (OEM) parts. Plaintiffs

contend that non-OEM crash parts are neither of "like kind and quality," nor are they sufficient to restore a policyholder's vehicle to its "pre-loss condition." For this reason, Plaintiffs contend that State Farm has breached its contract with its policyholders. Plaintiffs also contend that State Farm's use of non-OEM crash parts and the term "quality replacement parts" are violations of the Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 *et seq.*); Plaintiffs request compensatory damages and an injunction against State Farm.

State Farm denies any wrongdoing and contends that non-OEM parts are of "like kind and quality" to OEM crash parts, and that they fully restore a policyholder's vehicle to its "pre-loss condition." State Farm also contends that its policyholders are informed whenever non-OEM crash parts are used, and that its use of the term "quality replacement parts" is not misleading.

The Court has certified for litigation and trial the Plaintiff Class of State Farm policy holders described above. The Court's class certification order does not decide the merits of Plaintiffs' claims or State Farm's defenses. Plaintiffs will be required to prove the Class claims at trial set to commence on February 2, 1999.

Class Counsel have been appointed by the Court to represent the interests of the Class. Class Counsel include G. Patrick Murphy, Barrett Law Offices, the Rose Law Firm, Much Shelist Freed Denenberg Ament Bell & Rubenstein, P.C., and Lieff, Cabraser, Heimann & Bernstein, LLP. You will not be charged for Class Counsel's services. Instead, if they obtain a recovery for the Class, Class Counsel may apply to the Court for payment of their reasonable attorneys' fees and costs by State Farm or out of any funds recovered before distribution of

the net proceeds to the Class. You have the right to hire your own attorney. If you hire your own attorney, you will be responsible for paying that attorney's fee. You also have the right to seek to intervene or appear in the action with the Court's permission.

If you wish to remain a member of the Class, YOU NEED NOT DO ANYTHING AT THIS TIME. As Class members, you will be bound by all orders and judgments of the Court, and your claims will be terminated by the judgment in this case.

You may exclude yourself from the Class by writing to the address below, and expressly stating in a letter postmarked by June 5, 1998, that you wish to be excluded from the Class. If you exclude yourself from the Class, you cannot participate in any recovery for the Class, and you will not be bound by any Court orders or judgments. If you wish to remain a Class member, DO NOT send an exclusion letter.

If you have questions regarding this litigation, you may write to: Snider, et al. v. State Farm, et al., Plaintiffs' Class Counsel, P.O. Box 1500, Marion, Illinois 62959. You may also call 1-888-299-9777, or see the website at www.sfparts.com.

PLEASE DO NOT CONTACT THE COURT.

Dated: February 25, 1998. Honorable John Speroni
Associate Circuit Court Judge.

www.sfparts.com 1-888-299-9777

No. 97-2063

Supreme Court, U.S.
FILED
AUG 21 1998

IN THE

Supreme Court of the United States

October Term, 1997

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

against

CORRECTED COPY

THE HONORABLE JOHN SPERONI,
TAMMY SNIDER and MICHAEL AVERY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
ILLINOIS SUPREME COURT

BRIEF OF THE STATE OF NEW YORK AND THE STATE OF PENNSYLVANIA AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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No. 97-2063

Supreme Court of the United States
October Term, 1997

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

THE HONORABLE JOHN SPERONI, TAMMY SNIDER and MICHAEL AVERY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

BRIEF OF THE STATE OF NEW YORK AND THE STATE OF PENNSYLVANIA AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF *AMICI CURIAE*

The State of New York submits this brief *amicus curiae* in support of the petition for a writ of certiorari by State Farm Mutual Automobile Insurance Company.[1] New York objects to the judgment of the Illinois Supreme Court leaving intact the Illinois Circuit Court's grant of plaintiffs' motion to certify a nationwide class of approximately 5,000,000 insurance

[1] Pennsylvania joins with New York in submitting this brief.

policyholders in 48 states in litigation raising, among other things, consumer fraud claims to be governed by Illinois law.

New York has a significant interest in having this Court review the decision to certify a nationwide class in this matter. State Farm is the largest auto insurer in the United States, providing automobile insurance coverage to one out of every five insured drivers nationwide. State Farm insures close to 13.1% of the New York private passenger auto market, making it the second largest automobile insurer in the State. Approximately 1.24 million automobile physical damage policies are written by State Farm each year for New York residents, generating approximately $324 million in insurance premiums. Roughly 40% to 50% percent of the premiums charged in New York for comprehensive and collision coverage is attributable to coverage for physical damage to vehicles, which includes the coverage for replacement parts.

The claims in this case concern State Farm's practice of using nonoriginal equipment manufacturer ("non-OEM") replacement parts in the repair estimates for damaged automobiles, where the non-OEM parts are priced lower than original equipment manufacturer ("OEM") parts.The several states have adopted varying regulations with regard to the use of non-OEM parts. Some states, as in New York, permit and indeed encourage the use of these parts, while other states require their use. *See Petition*, n.7.

The Illinois court has ruled that the issue of whether State Farm's policy of using non-OEM parts constitutes a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act is appropriate for class resolution. The order of class certification will thus result in the application of Illinois law to the claims of New York policyholders, as well as those of 47 other states, all of whom contracted with State Farm subject to the various regulations of those separate states. This

raises the significant question of whether a state is protected against the extraterritorial application of another state's law in possible contravention of its own regulatory preferences, and of the sovereign right of each state to regulate the business of insurance within its own geographical boundaries.

SUMMARY OF ARGUMENT

Allowing this matter to proceed as a nationwide class action sets up a very real potential for conflict between the extraterritorial application of Illinois law and each state's own regulatory scheme to the detriment of the sovereign right of every state to regulate the business of insurance within its borders. Moreover, given the ever-present possibility of settlement in a nationwide class action, the Court may never have any other opportunity to review this order, which could directly intrude upon and undermine the several states' ability to implement their own regulatory choices.

ARGUMENT

I

PERMITTING THIS NATIONWIDE CLASS ACTION TO PROCEED WOULD ALLOW THE COURT OF ONE STATE TO OVERRIDE THE POLICIES AND REGULATIONS OF OTHER STATES AND SEVERELY IMPEDE THE ABILITY OF THE INDIVIDUAL STATES TO REGULATE THE BUSINESS OF INSURANCE

The United States Constitution has as one of its fundamental precepts a respect for the sovereignty of the individual states. As this Court long ago explained:

> The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions.

Pennoyer v. Neff, 95 U.S. 714, 720-722 (1877).

This principle of state sovereignty is embodied not only in the federal Constitution but in federal legislation as well. Its relevance here is most apparent in the McCarran-Ferguson Act of 1945, 15 U.S.C. § 1011 *et seq.*, where Congress declared that "the business of insurance, and every person engaged therein, shall be subject to the laws of the several states," 15 U.S.C. § 1012(a), thereby emphasizing the primacy of state regulation of insurance. *See generally United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 500 (1993).

In ruling that this action may be maintained as a class action, the Illinois court determined that the question of whether State Farm's practice of using non-OEM parts constitutes a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act is a common issue appropriate for class resolution under Illinois law. *Petition*, App. 9a. If this determination is permitted to stand, a single state court could effectively disrupt the entire system of individual state insurance regulation, contrary to the McCarran-Ferguson Act and the underlying constitutional precepts of individual state sovereignty.

The State of New York has a carefully calibrated regulatory scheme setting forth "standards for prompt, fair and equitable

settlement of motor vehicle physical damage claims." 11 NYCRR § 216.7. That regulatory scheme, based, *inter alia*, on a policy of cost control, allows an insurer's repair estimate to be based upon the use of nonoriginal equipment manufacturer crash parts[2], as follows:

> (5) If the insurer's repair estimate is based upon the use of any non-OEM crash part:
>
> (i) the estimate shall specify the non-OEM or non-OEM supplier;
>
> (ii) the insurer shall not, without consent of the insured or the insured's designated representative, specify non-OEM crash parts from more than three different suppliers for any one repair;
>
> (iii) the crash part shall equal or exceed the comparable OEM crash part in terms of fit, form, finish, quality and performance;

---

[2]The regulation defines "crash part" to mean "a part of a motor vehicle, which (i) is made of sheet metal, plastic, fiberglass, or similar material, including a door, fender, panel, bumper, hood, floor or trunk lid, but not including windows or hubcaps; and (ii) constitutes or provides support for the motor vehicle's exterior." 11 NYCRR § 216.7(a)(6). "Original equipment manufacturer" or "OEM" is defined to mean "a motor vehicle manufacturer or distributor that produces or markets, under its own name, crash parts for use in motor vehicles that it manufactures or distributes under its own name." 11 NYCRR § 216.7(a)(7). "Nonoriginal equipment manufacturer" or "non-OEM" means "a manufacturer or distributor (including any entity supplying the required warranty other than a manufacturer), that produces or markets, under its own name, crash parts for use in motor vehicles that it does not manufacture or distribute." 11 NYCRR § 216.7(a)(8).

> (iv) the crash part must be warranted by the non-OEM at least to the extent and duration as the comparable OEM crash part;
>
> (v) the insurer shall specify only certified crash parts, in regard to any part that has been duly certified by a qualified certifying entity acceptable to the superintendent;
>
> (vi) if the crash part has not been certified by a qualified certifying entity acceptable to the superintendent, the non-OEM must issue a written warranty, for at least the period of the insured's ownership of the vehicle, that the crash part equals or exceeds the comparable OEM crash part in terms of fit, form, finish, quality and performance; and
>
> (vii) the insurer shall cause the damaged vehicle to be restored to its preloss condition consistent with the non-OEM warranty, at no additional cost to the insured and within a reasonable time, if the non-OEM fails to honor its warranty required in subparagraph (iv) or (vi) of this paragraph.

11 NYCRR § 216.7(b)(5).

This regulatory provision is designed to balance consumer interests by permitting competition to operate in the pricing of repair parts while assuring that only quality and warranted parts will be used in repair estimates. Consumer cost containment is the primary goal.

The certification of a nationwide class action in which the claims of all State Farm policyholders are to be adjudicated based on Illinois law sets up the very real potential for conflict between the extraterritorial application of the Illinois statute and New York's carefully crafted regulatory scheme governing

its insurance industry. If State Farm's policy on use of non-OEM parts is found to violate the Illinois consumer fraud statute as applied to a national class, it can be anticipated that not only State Farm but all insurers will immediately change their claims handling practices to specify the use of only original equipment crash parts in repair estimates to avoid statutory liability. This would directly intrude upon and undermine New York's ability to implement its policy of cost containment as articulated in the aforestated regulation.

Allowing an Illinois court to apply its own law to override the regulatory choices of the various states would certainly be contrary to the spirit, if not the letter of the McCarran-Ferguson Act. *See F.T.C. v. Travelers Health Assn.*, 362 U.S. 293, 300-302 (1960) (noting that it would be inconsistent with the purposes of the Act to "delegat[e] to any one State sole legislative and administrative control of the practices of an insurance business affecting the residents of every other State in the Union"). The application of the Illinois law here could effectively sweep aside the multiple and distinct policy reasons for each state's own regulatory structure. Such an override of state policy and regulation could occur in every state in which a member of the class resides -- a total of 48 states in all. Moreover, it would likely lead to the situation in which State Farm is required under the laws and regulations of one state to specify the use of non-OEM parts while being held liable for doing so under the laws of another. *See Petition,* n.7.

The nationwide class certification threatens these results on the slender justification of facilitating litigation and preserving scarce judicial resources both in Illinois and other states. *Petition,* App. 6a. While these are laudable goals, they are insufficient to overcome principles of state sovereignty and comity to allow a state to "legislate" beyond its borders. *See BMW of North America v. Gore,* 517 U.S. 559, 568-69, 572-73 (1996) ("No one doubts that a State may protect its citizens by

prohibiting deceptive trade practices...But the States need not, and in fact do not, provide such protections in a uniform manner....Alabama may insist that BMW adhere to a particular disclosure policy in that State. Alabama does not have the power, however, to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents. Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions.").

II

IMMEDIATE REVIEW IS REQUIRED IN ORDER TO PREVENT THE COMPROMISE OF NEW YORK'S ABILITY TO REGULATE THE BUSINESS OF INSURANCE EFFECTIVELY.

Review of the order of class certification at this stage of the litigation is necessary in order to avoid the immediate potential for conflict among the several states. If settlement occurs, an order which impermissibly calls for the extraterritorial application of Illinois law will never be reviewed. Indeed, whether or not settlement occurs here, the order of class certification immediately impacts New York's sovereign right freely to regulate its own insurance industry, by creating the potential that the law of another state may be deemed applicable, in any class action, to the conduct of the insurance business in this State. New York has every interest in protecting its insurance laws, regulations, and policies against such a compromise.

CONCLUSION

For the foregoing reasons, New York and Pennsylvania, as *amici curiae*, respectfully urges the Court to grant the petition for a writ of certiorari.

Dated: New York, New York
August 21, 1998

Respectfully submitted,

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No. 97-2063

In the Supreme Court of the United States

OCTOBER TERM, 1997

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *Petitioner*

v.

THE HONORABLE JOHN SPERONI, TAMMY SNIDER, AND MICHAEL AVERY, *Respondents*

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

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REPLY BRIEF FOR THE PETITIONER

Respondents contend that the circuit court's rulings are well within the mainstream of class action jurisprudence and that, in any event, there is no pressing need to resolve the issues raised in the petition now rather than after trial. There is no better answer to that contention than the nine amicus briefs filed in support of the petition. Not only are the members of the insurance industry and the broader business community united in the position that this case is of extraordinary significance and should be immediately resolved. That view is shared by four public interest groups that the Court would not typically expect to be supporting an insurer's petition — Public Citizen, the Center for Auto Safety, the Consumer Federation of America, and the Massachusetts Public Interest Research Group — who support certiorari because "the legal issues raised by the petition are recurring and important and the Court's resolution of them will * * * help curb abuse in *both* state and federal courts" (Public Citizen et al. Am. Br. 4).

In addition, the umbrella organization for state insurance commissioners, the National Association of Insurance Commissioners ("NAIC"), which "supports the use of class action lawsuits brought by insurance consumers under certain conditions" (NAIC Am. Br. 1), urges immediate review because, "if this nationwide class action is allowed to proceed, it could establish a precedent that would undermine our system of state-by-state insurance regulation, as the laws of particular states are trumped or re-trumped in patchwork fashion in nationwide class actions that attack, as this class action attacks, insurer conduct that is treated differently by the different states" (*id.* at 9). And four States, all of which already were represented in the NAIC brief, felt so strongly about the pernicious consequences of the ruling below that they filed two additional amicus briefs emphasizing the seriousness of this matter. The legislators responsible for enacting state insurance laws also are concerned about the circuit court's decision to exalt Illinois' laws over those of every other State and warn that "[t]hese issues will elude the Court unless certiorari is granted interlocutorily at the class certification stage." National Conference of Insurance Legislators ("NCOIL") Am. Br. 10.

As the amici emphasize, the circuit court's rulings threaten to have devastating repercussions for the multi-state system of regulating insurance, to force nationwide discontinuation of an

unambiguously pro-consumer practice, and to disregard the due process rights of both State Farm and the members of the class. The arguments offered by respondents in their effort to fend off certiorari are based on distortions of the relevant procedural facts and applicable legal principles. When these distortions are corrected, the appropriateness of either summary reversal or plenary review becomes clear.

1. *Jurisdiction*. Respondents are simply wrong in claiming (Opp. 7-12) that a state court's denial of mandamus, prohibition and/or a writ of supervision is not a final judgment for purposes of this Court's jurisdiction under 28 U.S.C. § 1257. It has long been established that "[p]rohibition is a distinct suit and the judgment finally disposing of it is a final judgment within the meaning of the Judicial Code * * *." *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30, 31 (1916).[1]

Respondents' effort (Opp. 12) to distinguish this long line of cases is unavailing. Contrary to respondents' evident assumption, Section 1257 does not require that the federal *issue* be finally decided, but rather that the state court *proceeding* be final. *Weston v. City Council*, 27 U.S. (2 Pet.) 449, 464 (1829) ("If [the predecessor to Section 1257] were applicable to those judgments and decrees only in which the right was finally decided, and could never again be litigated between the parties, the provisions of the section would be confined within much narrower limits than the words import, or than congress could have intended."). Because an

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[1] See also, *e.g.*, *Detroit & M. Ry. v. Michigan R.R. Comm'n*, 240 U.S. 564, 571 (1916) ("it is settled that a proceeding in mandamus is an independent adversary suit and a judgment awarding or refusing the writ is a final judgment within the meaning of the statute"); *Missouri ex rel. St. Louis, B. & M. Ry. v. Taylor*, 266 U.S. 200, 206 (1924) ("The application for a writ of prohibition is an independent adversary suit which was finally determined by the judgment under review."); *Michigan Central R.R. v. Mix*, 278 U.S. 492, 494 (1929) (state supreme court's unexplicated denial of defendant's application for a writ of prohibition "is final within the meaning of § 237a of the Judicial Code"); *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8, 14 (1931) ("The proceeding for a writ of prohibition is a distinct suit and the judgment finally disposing of it is a final judgment within the meaning of § 237 (a) of the Judicial Code."); cases and authorities cited at Pet. 1.

application for mandamus, prohibition or a supervisory writ is an independent, original action in the state supreme court, the denial of such an application is a final judgment that terminates that proceeding. For that reason, the Court has found itself to have jurisdiction to review denials of prohibition even when it clearly would have been possible for the aggrieved party to raise the federal issue on a direct appeal and then pursue review in this Court. See, *e.g.*, *Bandini, supra* (reviewing facial constitutional challenge to California statute, which could have been raised on direct review of trial court's injunction); *Mt. Vernon-Woodberry, supra* (reviewing claim that condemnation proceedings were unconstitutional for lack of a public purpose even though that claim could have been raised in an appeal from a final judgment of condemnation).

Nor, contrary to respondents' assertion (Opp. 12), has the Court limited this principle to cases in which the mandamus or prohibition proceeding "conclusively determined the constitutional limits of a lower court's jurisdiction." In fact, several of the cases cited above or in the petition did not involve challenges to the jurisdiction of the lower court. See, *e.g.*, *Weston, supra*; *Detroit & M. Ry., supra*; *Board of Educ. v. Superior Court*, 448 U.S. 1343, 1345-1346 (1980) (Rehnquist, J., in chambers).

The four Supreme Court cases cited by respondents (at Opp. 8, 11) — *Market St. Ry. v. Railroad Comm'n*, 324 U.S. 548 (1945); *Department of Banking v. Pink*, 317 U.S. 264 (1942); *Gospel Army v. Los Angeles*, 331 U.S. 543 (1947); and *Gillette Co. v. Miner*, 459 U.S. 86 (1982) — provide no support for their jurisdictional argument. None of these cases involved prohibition or mandamus proceedings. Instead, each involved the entirely different question of when or whether a state supreme court decision rendered on *direct review* was "final." For example, in *Gospel Army*, this Court held that it lacked jurisdiction to review a decision of the California Supreme Court on direct review remanding a case for a new trial. By contrast, in a companion case not mentioned by respondents, the Court held that it *did* have jurisdiction to review the California Supreme Court's denial of a writ of prohibition. *Rescue Army v. Municipal Court*, 331 U.S. 549, 565-568 (1947).

Respondents' quotations of snippets from Illinois cases (Opp. 8-9) are no more helpful. Four of their cases — *Branch v.*

European Autohaus, Ltd., 424 N.E.2d 6 (Ill. App. Ct. 1981); *Flores v. Dugan*, 435 N.E.2d 480 (Ill. 1982); *O'Hara v. State Farm Mut. Auto. Ins. Co.*, 484 N.E.2d 834 (Ill. App. Ct. 1985); and *South Chicago Community Hosp. v. Industrial Comm'n*, 254 N.E.2d 448 (Ill. 1969) — addressed the question whether a trial court's ruling was final for purposes of appellate review. The fifth — *Relph v. Board of Educ.*, 420 N.E.2d 147 (Ill. 1981) — held that an intermediate appellate court's decision remanding a case to the trial court was not final for *res judicata* purposes. This case, by contrast, involves the Illinois Supreme Court's denial of mandamus/prohibition/writ of supervision, which manifestly is a final judgment in an independent proceeding.

2. *The claimed existence of an independent and adequate state ground.* Because the Illinois Supreme Court did not issue an opinion, respondents suggest (Opp. 12-13) that they are entitled to a presumption that the court denied mandamus/prohibition on some unspecified independent and adequate state ground. They have the presumption precisely backwards. Because the order denying mandamus/prohibition does not contain a "plain statement" that it was based on state grounds, the "conclusive presumption" is that it was not. *Harris v. Reed*, 489 U.S. 255, 261-262 (1989); *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985); *Michigan v. Long*, 463 U.S. 1032, 1040-1042 (1983). The fact that the Illinois Supreme Court's order was a summary disposition is beside the point. When, as here, the federal issues were raised and decided in the trial court, a summary disposition in the appellate court cannot immunize the appellate court's judgment from review. See, *e.g.*, *Mix, supra* (reviewing and reversing Michigan Supreme Court's unexplicated judgment denying a writ of prohibition where federal claim was raised and rejected in the trial court).

3. *Need for interlocutory review.* Respondents contest as unsubstantiated (Opp. 14-15 & n.11) our contention that nationwide class actions are rarely tried to a verdict and suggest that there therefore is no need for interlocutory review of the orders in this case. As the Chamber of Commerce points out (Am. Br. at 11 n.7), however, studies show that certified class actions are more than twice as likely to settle as putative class actions that are not certified. Moreover, respondents mischaracterize the *Masonite* case,

which we cited as an example of this phenomenon. That case (in which the undersigned firm served as Supreme Court counsel) settled on the eve of the second phase of a planned multi-phase trial after the Alabama Supreme Court refused to decertify the class notwithstanding a federal court's conclusion that the first phase, which was limited to resolving a single issue under five different amalgamated standards, demonstrated the unmanageability of the case as a class action (see *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 426 n.19 (E.D. La. 1997)).

Respondents also suggest (Opp. 16) that State Farm's decision to pursue an original proceeding in the Illinois Supreme Court rather than seek a discretionary appeal immediately after the initial certification somehow makes this case less appropriate for review. Not only does that argument lack support in precedent or reason, it also ignores the fact that State Farm *did* request a discretionary appeal immediately after the trial court adopted class counsel's notice plan. Despite the fact that close to a year remained before trial, the trial court refused to certify an appeal of either the amended certification order *or* the day-old notice order, accepting respondents' argument that the case was too close to trial and that respondents had committed funds in reliance on the newly minted notice order. State Farm can hardly be faulted for having (accurately) predicted that a court that had signed respondents' proposed class certification order with nary a change would be unlikely to authorize a permissive appeal.[2]

4. *Choice of law*. Respondents assert (Opp. 3, 18, 19) that the circuit court never made a choice-of-law determination and hence that review by this Court would be premature. That assertion

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[2] Respondents are simply wrong in suggesting (Opp. 16) that the procedure for interlocutory review under Illinois Supreme Court Rule 308 is equivalent to the procedure contemplated in the proposed Fed. R. Civ. P. 23(f). Rule 308, like 28 U.S.C. § 1292(b), affords the trial court an absolute veto; the proposed federal rule would remove the veto power and give appellate courts the discretion to determine whether to hear the interlocutory appeal. There also is no basis for respondents' assertion (Opp. 16) that we are seeking "an order from this Court legislating the mandatory review of class certification orders." We merely ask this Court to exercise its *discretion* to grant review in *this* case.

is based on a misleading quotation from the circuit court's opinion. While, in the quoted material, that court did reserve decision about whether the law of Illinois could be applied to each class member's *breach of contract* claim, it elsewhere unambiguously held that there was no constitutional impediment to the pursuit of an Illinois CFA claim by class members nationwide. See Pet. App. 10a-11a. It is the latter ruling that was the subject of the mandamus/prohibition proceeding and that is the basis for the first issue in the petition.

Respondents' contention (Opp. 18 & n.14) that State Farm is relying on arguments here that it did not make in the trial court fails to perceive the difference between arguments and authorities on the one hand and "claims" on the other hand. State Farm squarely raised the constitutional choice-of-law claim; the fact that it has subsequently added to the authorities cited in support of that claim is no impediment to review. *Yee v. City of Escondido*, 503 U.S. 519, 534-535 (1992).[3]

Nor is there any validity to respondents' assertion (Opp. 19-20) — which they did not make in the trial court and which was not the basis of that court's ruling — that State Farm failed to demonstrate the existence of a "true conflict." To begin with, by focusing exclusively on our discussion of the various state laws relating to non-OEM parts, respondents conveniently gloss over our showing below that the consumer fraud laws of the different states vary materially. See State Farm's Proposed Conclusions of Law on Plaintiffs' Motion for Class Certification ¶¶ 88-89 (Nov. 17, 1997).[4]

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[3] The suggestion (Opp. 18 n.14) that the sovereignty discussion in *BMW* is based exclusively on the Commerce Clause (which State Farm did not separately identify as a source of the constitutional limitation on choice-of-law) is plainly incorrect. In the relevant section of the *BMW* opinion, the Court cited a variety of cases that were predicated upon the Due Process Clause, the Full Faith and Credit Clause or on the structure of the Constitution as a whole. See 517 U.S. at 571 & n.16 (citing *Bonaparte v. Tax Court*, 104 U.S. 592 (1881); *Bigelow v. Virginia*, 421 U.S. 809 (1975); *New York Life Ins. Co. v. Head*, 234 U.S. 149 (1914); *Huntington v. Attrill*, 146 U.S. 657 (1892)).

[4] As State Farm pointed out to the circuit court (*id.* ¶ 89), it is widely accepted that state consumer fraud causes of action vary materially, making certification of a nationwide class action inappropriate. See, *e.g.*,

Moreover, respondents are wrong in contending (Opp. 19-20) that they have structured their case so as to render irrelevant the myriad differences in the state laws relating to non-OEM parts. The numerous States that permit, encourage or require the use of non-OEM parts that are comparable in quality to their OEM counterparts necessarily have made a judgment that such parts actually exist. Otherwise the enactment of legislation and/or regulations by some three dozen States authorizing their use would have been an utterly meaningless act. These States must necessarily have a very different understanding of the meaning of "like kind and quality" than the one respondents will attempt to urge on the trial court as a matter of Illinois law.

As the amicus briefs of Public Citizen et al., New York and Pennsylvania, Nevada and Massachusetts, and NCOIL all reflect, each State has balanced the considerations relating to the use of non-OEM parts in its own particular way. It would trump the rights of the other States to permit a judge in Illinois to apply Illinois law in a way that would effectively preclude the use of non-OEM parts in those other States.[5]

In re Ford Motor Co. Ignition Switch Prods. Liab. Litig., 174 F.R.D. 332, 350-351 (D.N.J. 1997); *In re Stucco Litig.*, 175 F.R.D. 210, 217 (E.D.N.C. 1997). Since the time of that filing, two Illinois federal courts have expressed the same conclusion. *Fisher v. Bristol-Myers Squibb Co.*, 1998 WL 299798, at *6 (N.D. Ill. May 28, 1998); *Tylka v. Gerber Prods. Co.*, 178 F.R.D. 493, 497-498 (N.D. Ill. 1998).

[5] Respondents' assertion (Opp. 2 n.1, 19 n.16) that, if they prevail, State Farm would not have to discontinue specifying the use of non-OEM parts disregards their own request for relief, which includes "[a]n Order enjoining State Farm * * * *from refusing to pay for original equipment parts* * * *." Second Amended Class Action Complaint (A) at 13 (emphasis added). What is more, respondents' suggestion is fanciful. Particularly in today's litigation climate, no rational insurer would continue specifying non-OEM parts after a ruling in a nationwide class action that such parts are not of like kind and quality and are inherently incapable of restoring a vehicle to its pre-loss condition. That is why Public Citizen et al., NAIC, and the state amici, who respondents admit are thoroughly familiar with their claims in this case (see Opp. 3 n.2), all are of the view that, if not decertified, this class action presents a very real threat of squelching the use of non-OEM parts nationwide.

5. *The use of the class action to alleviate the class's burden of proof and abrogate State Farm's right to defend.* In response to our contention that the trial court's certification order conflicts with cases holding that the class action device may not be used to alleviate the class's burden of proof or prevent the defendant from raising individualized defenses, respondents offer little more than an argument on the merits (and an unpersuasive one at that). They suggest no reason why the Court should not definitively resolve the issue. Since we filed the petition, the conflict on this issue has deepened. In one case, cited by respondents, the Ohio Supreme Court reversed a trial court's denial of class certification, concluding that a class-wide inference of reliance and an objective standard for the existence of a class-wide fiduciary duty could be used to obviate the need to put on individualized evidence. *Cope v. Metropolitan Life Ins. Co.*, 696 N.E.2d 1001 (Ohio 1998).[6] By contrast, the Fourth Circuit recently overturned a class certification, stating: "It is axiomatic that the procedural device of Rule 23 cannot be allowed to expand the substance of the claims of class members. Thus courts considering class certification must rigorously apply the requirements of Rule 23 to avoid the real risk * * * of a composite case being much stronger than any plaintiff's individual action would be." *Broussard v. Meineke Discount Muffler Shops, Inc.*, 1998 WL 512926, at *14 (4th Cir. Aug. 19, 1998) (citation omitted). See also *Small v. Lorillard Tobacco Co.*, 1998 WL 398176, at *7 (N.Y. App. Div. July 16, 1998) (decertifying five million member tobacco class action in part because "[d]efendants have a due process right to cross-examine each [class] member, a task that would take hundreds of years").

As these cases reflect, the question presented here is an extremely important one that recurs in class action litigation. The present case would be an especially good one in which to resolve that question. With five million class members, 33,000 different

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[6] Respondents also note (Opp. 22) that two state courts certified statewide non-OEM class actions. Those cases conflict with the more recent decisions of federal courts in Tennessee and Alabama and a different Illinois state court refusing to certify similar class actions on the ground that class members' claims could not be adjudicated by means of common proof. See Pet. 18 & n.10.

crash parts,[7] and vehicles of every possible pre-loss condition, it is inconceivable that State Farm's specification of non-OEM parts has never once been sufficient to restore a class member's vehicle to pre-loss condition. Yet respondents' all-or-nothing "common evidence" approach necessarily would result in either an across-the-board exoneration for State Farm or a class-wide finding of liability and an award of damages to each of the five million class members. The question whether due process permits the use of the class action device to provide damages to those who could not possibly prove that they were injured (and, conversely, whether it permits extinguishment of the claims of class members who *could* make an individualized showing of injury), is starkly presented here and warrants resolution.

6. *Notice*. We asserted in the petition that the trial court's notice order cannot be squared with this Court's consistent pronouncement that publication notice is an inadequate substitute for mailed notice. In response, respondents insist (Opp. 24-30) that the Court has never held that mailed notice must always be given in lieu of publication notice, that publication notice (if done the way they did it) is better than mailed notice, and that publication notice is constitutionally sufficient whenever the mailing list is not completely accurate. While we disagree strongly with these arguments, they all support granting review, not denying it. Cf. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (lower courts must continue following this Court's precedents and leave prerogative of overruling them to this Court). So too does respondents' citation of *Cartt v. Superior Court*, 124 Cal. Rptr. 376 (Cal. App. 1975), which demonstrates that the question whether and when publication notice may constitutionally be substituted for mailed notice is a recurring and important one.

In any event, respondents' defense of the circuit court's ruling is based on distortions of the relevant facts. First, respondents' representation (Opp. 4, 27, 29) that State Farm wanted to send

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[7] Respondents' reference (Opp. 2) to 25 crash parts is highly misleading. There are 25 *categories* of crash parts (*e.g.*, fenders, hoods, *etc.*), but, because there are myriad makes and models of cars and numerous different manufacturers of parts, there are a total of over 33,000 unique crash parts implicated in this litigation.

mailed notice to an "inaccurate" list is misleading. The inaccuracy to which respondents advert stems solely from the unavoidable fact that people sometimes change addresses, something that always has been true but which never before has been deemed a reason for dispensing with an effort to provide actual mailed notice. As the amici point out, respondents' argument may warrant *supplementing* with publication notice in an effort to reach class members for whom State Farm lacks a current mailing address but it does not justify denying actual mailed notice to the more than a million class members for whom State Farm does have current addresses. See Public Citizen et al. Am. Br. 9-10; Washington Legal Foundation et al. Am. Br. 13.

Second, the suggestion that the trial court's decision not to require mailed notice was vindicated because the publication notice "reached" 78% of the class is based upon a misleading use of the term "reach." As respondents' own so-called notice expert acknowledged, in the advertising industry the term "reach" refers to the number of persons who "opened or read" *the publication* containing the advertisement (Affidavit of Todd B. Hilsee ¶¶ 11-13 (Nov. 21, 1997)); the "reach" data shed no light on the number of people who actually noticed and read *the advertisement*. Thus, a class member who might have purchased *People* magazine (or even skimmed it in the doctor's office) would be included in the reach statistics. Respondents make no claim as to how many class members actually saw and read the class notice — and for good reason. Of the five million class members, only 15 — a paltry .0003% of the class — opted out. Declaration of Scott P. Nealey Regarding the Response of Class Members to the Notice Program ¶ 6 (July 9, 1998). By contrast, 3,400 of the 28,000 class members in *Shutts* (*i.e.*, 12% of the class) opted out (even though the average claim was a mere $100 (472 U.S. at 801)), supporting this Court's conclusion that due process was satisfied by the combination of mailed notice and an opt-out right. *Id.* at 813. That only a minuscule number of class members opted out here, notwithstanding the pro-consumer nature of the practice under attack, illustrates the absurdity of respondents' suggestion that publication notice was as good or better than an actual mailed notice. See Public Citizen et al. Am. Br. 8, 10.

Respectfully submitted.

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